UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOHNSON & JOHNSON,

Plaintiff,

v. 06 CV 7685 (RJS)
Trial

GUIDANT CORPORATION,

Defendant.

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New York, N.Y.
December 16, 2014
9:30 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Plaintiff
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AND
SHEARMAN & STERLING, LLP
BY: JOHN GUELI, ESQ.

(In open court)

CHARLES MULANEY, resumed.

REDIRECT EXAMINATION

BY MR. BOIES:

THE COURT: Are we ready, Mr. Boies?

MR. BOIES: Yes. Thank you, your Honor.

THE COURT: Let's proceed.

BY MR. BOIES:

Q. Good morning, Mr. Mulaney.

A. Good morning.

Q. I'd like to begin by directing your attention again to Mulaney Exhibit 25 which is in the cross-examination binder that you have up there.

A. Yes, I do.

Q. This was an exhibit that you were asked about on cross-examination. Do you recall that?

A. Yes, I do.

Q. One line of this we took a certain amount of time is on the page that ends in the Bates No. 8734. It is the fourth paragraph on the page, the one that has the last sentence that says, "In addition, a takeover proposal may be made by one person or a number of joint bidders."

Do you see that?

A. Yes.

Q. You told counsel for Johnson & Johnson and you told the

Court that you had not given notice of a joint bid but that you considered this a rhetorical argument, I think you said. Is that correct?

A. Yes, to rebut what I understood to be an assertion in Mr. Deyo's letter that somehow the merger agreement would have prevented both Boston Scientific and Abbott from getting together to formulate a takeover proposal.

Q. Why did you think that this sentence was a useful rhetorical point? What were you trying to convey?

A. I was trying to convey that the merger agreement Johnson & Johnson had entered into did not prevent from occurring what did occur; namely, that Boston Scientific and Abbott working together came up with a takeover proposal that the board of Guidant found to be superior.

THE COURT: But the merger agreement would have required that there be notice of both bidders if that were the case, right?

THE WITNESS: Yes. If the theory on which Guidant was proceeding was that it was a -- that we had two bidders two make offers of a takeover proposal. I was making the rhetorical point that what happened could have happened consistent --

THE COURT: Who was saying it couldn't have happened?

THE WITNESS: I understood Mr. Deyo's letter to express surprise and shock that somehow Abbott was working with

Boston Scientific in formulating a takeover proposal.

THE COURT: Well, because no notice had been given and because they weren't named as a joint bidder.

THE WITNESS: Well, no, your Honor. I understood Mr. Deyo's complaint to be that somehow under the merger agreement those two parties couldn't get together to formulate a takeover proposal under any circumstance.

THE COURT: Let's look at that letter and you tell me where it says that.

MR. COFFEY: Kury 50, your Honor.

THE COURT: What is it?

MR. COFFEY: Kury 50.

THE COURT: Take a look at Kury 50 and tell me what part of that letter you are responding to with your rhetorical point.

THE WITNESS: Well, the overall letter itself, your Honor, the fourth paragraph says or suggests we violated the no-solicitation clause by our conduct with Abbott in dealing with Abbott. And the last paragraph has a general catchall of a concern as to how Guidant could possibly be giving information to Abbott consistent with the terms of the no-solicitation agreement.

And the rhetorical point was while Guidant wasn't relying principally on the proposition that Abbott was joining Boston Scientific as the maker of a takeover proposal, that could have happened very easily. It didn't. Your Honor is correct, we did not give formal notice. It could have. And Johnson & Johnson did not have a merger agreement in which that was not something that could possibly have happened and indeed it did.

THE COURT: Yes, but it is just not clear to me that anybody is suggesting that it couldn't have happened under any circumstances. This reminds me of a Saturday Night Live episode where they had a historical program called "What If?" What if Eleanor Roosevelt could fly? Some guy went and said what would have happened if Eleanor Roosevelt could have flown? But I don't see how your rhetorical point is responsive to anything in this letter. You're saying it's responsive, you think, to the general tenor of the letter but not to any specific provision.

THE WITNESS: To the tenor of the letter and I think to the last paragraph, the general proposition as to how possibly could your conduct be consistent with the no-solicitation clause of the agreement.

THE COURT: The last paragraph says, "Based upon our continued relationship of cooperation and disclosure, I am hopeful that you can get back to me as soon as possible regarding Guidant's explanations of the circumstances relating to, and the rationale behind, the disclosure of the Guidant business information to Abbott and in particular Guidant's view on how this disclosure could possibly have been consistent with the terms of the no-solicitation clause of the agreement."

So they are asking, it seems to me, you to articulate what the rationale for the disclosure was; not possible rationales that weren't actually the basis for the disclosure.

THE WITNESS: Well, your Honor, as I indicated yesterday, given the timing of this letter, and the circumstances under which it was delivered, we were struggling mightily to view the letter as being produced in good faith and were trying to understand on what basis these allegations were being made at this point in time.

THE COURT: All right. But they asked you for an explanation. When I say you, I mean your client. They asked for an explanation as to what the rationale was. And the last sentence of the fourth paragraph you have already said was not one of the rationales for the disclosure, correct?

THE WITNESS: That's correct, your Honor.

THE COURT: So what was the rationale for the disclosure?

THE WITNESS: Abbott was a representative of Boston Scientific making a takeover proposal.

THE COURT: Any others?

THE WITNESS: That was basically it, your Honor.

THE COURT: OK. So that's it. Abbott was a representative.

THE WITNESS: Correct.

THE COURT: Is that in the letter that you drafted?

THE WITNESS: The word representative isn't in the letter I drafted.

THE COURT: Where is the substance of what you just told me in this letter?

THE WITNESS: Well, I understood Mr. Deyo's letter not to be complaining that information was given to other representatives of Boston Scientific; namely, Bank of America and Merrill Lynch financial advisors -- I mean financial sources, and I was making the point that Abbott too was a financial source.

THE COURT: But they asked for a rationale. It doesn't seem to me you provided a rationale. Do you think you did in this letter, this draft that you prepared?

THE WITNESS: This draft that I prepared was not a full response of legal reasons why Guidant was permitted to do what it did.

THE COURT: Just point to me in your draft where you articulate the rationale for sharing this information with Abbott.

THE WITNESS: Well, the paragraph, the fifth paragraph, Abbott in providing financing for Boston Scientific's proposal is attempting to make a point that Johnson & Johnson didn't complain about this -- about Guidant information going to Bank of America or Merrill Lynch who provided financing.

THE COURT: That's not a rationale under the merger agreement, is it?

THE WITNESS: It would be if -- because my understanding is that a financing source is a representative as well of Boston Scientific.

THE COURT: But you don't say that here. You don't say: We believe that a financing source is a representative and is therefore covered by 4.02(A) of the merger agreement. You don't say that.

THE WITNESS: I do not say that, your Honor. This letter was not an attempt to state the complete rationale for why Guidant was permitted to do what it did. As I said, it was, in some considerable part, rhetoric, as the last paragraph would suggest, because of the puzzlement that we and Guidant had as to what caused this letter to be sent at this point in time, and could this really -- could Mr. Deyo really be serious with his allegations given all the course of conduct prior to January 23.

THE COURT: Go ahead, Mr. Boies.

BY MR. BOIES:

Q. Mr. Mulaney, focusing on the second sentence of the fifth paragraph that you've referenced where you say "It is perfectly reasonable and appropriate for Boston Scientific's financing sources to have access to due diligence information under an appropriate confidentiality agreement," what did you mean by that?

A. I meant that Boston Scientific's financing sources as representatives of Boston Scientific within the definition of representatives in 4.02(A) was entitled to get due diligence information.

THE COURT: Why didn't you say that?

THE WITNESS: Because, your Honor, as I say, the -- this response partook more in the nature of a rhetorical response than a fulsome articulation of the reasons why Boston Scientific -- sorry -- Guidant was permitted to do what it did.

THE COURT: But you don't make any reference at all to the merger agreement in this letter, right?

THE WITNESS: I don't see the term merger agreement in the letter, your Honor.

THE COURT: But, I mean, Kury 50, which is the letter from Mr. Deyo to Mr. Kury, specifically references Section 4.02(A) of the merger agreement. It does it multiple times and it asks for your rationale or your client's rationale; and in your draft response, you don't make any reference to 402 at all explicitly, right?

THE WITNESS: Correct.

THE COURT: OK.

BY MR. BOIES:

Q. Now, although you do not mention 4.02 explicitly, what section of the merger agreement contains the no-solicitation clause?
A. 4.02(A).
Q. And when you referred to the no-solicitation obligations under the merger agreement, did you believe that that was clear what section of the merger agreement you were talking about?
A. Yes.
Q. What section was that?
A. 4.02(A).
Q. When you had received a copy of Kury Exhibit 50, the letter from Mr. Deyo, dated January 23, 2006, when he referred in several paragraphs to the no-solicitation section of our agreement, for example, in the next to last paragraph, when he talks about the no-solicitation section of our agreement, what section did you understand him to be referring to?
A. 4.02(A).
Q. And you talk about "our agreement." What agreement did you understand him to be talking about?
A. The amended Johnson & Johnson Guidant merger agreement.
Q. When you talked about your "no-solicitation" obligations under the merger agreement, did you believe that you were responding to the substance of what Mr. Deyo had written?
A. Well, in part. As I say, it wasn't a complete response, but it was responsive to his assertions with respect to 4.02(A)

in part.
Q. Now, you have said that Guidant did not give notice of Abbott as a joint bidder, correct?
A. Not formal notice, although, as I say, on January 9 we did provide Johnson & Johnson with the Boston Scientific/Abbott agreement.
Q. But before January 9, at the time the information was first given to Abbott, you had not given notice under the agreement that would be required to designate Abbott as the maker of a takeover proposal, correct?
A. Correct.
Q. And you've testified that you were not relying on that in terms of your legal technical analysis, correct?
A. Correct.
Q. Now, what I want to understand is why you thought it was useful then to refer to this in the last sentence of paragraph four of the letter in response to Mr. Deyo?
A. To make the point to Mr. Deyo that what happened was permitted by the Johnson & Johnson merger agreement; or put another way, the Johnson & Johnson merger agreement did not prevent by its terms Abbott and Boston Scientific from working together to formulate a superior takeover proposal.
Q. Now, I want to pursue what relevance, if any, that has to the correspondence or disagreement between Guidant and Johnson & Johnson. What relevance, if any, was there to the fact that

there was another way that you could have accomplished this, the same result, even though just for argument's sake, say, we concluded that Abbott was not a representative. What you are saying is there was another way for us to accomplish this. What relevance, if any, did that have to your thinking?
A. The relevance is that Johnson & Johnson could not have the rational expectation that what did happen could not have happened consistent with the terms of the merger agreement.

THE COURT: Do you think anybody could read what you wrote or what you proposed here and not come away with the conclusion that this was an alternative theory as to why it was permissible to make the disclosure that was made?

THE WITNESS: As I said, your Honor, the letter partook of rhetoric. It was not a fulsome legal response to --

THE COURT: I'm not sure how calling it rhetoric sort of solves the problem.

What you say is "Nothing in the no-solicitation provisions prevents a party from making a takeover proposal from seeking to finance the takeover proposal in part by a divestiture or attempting to address regulatory concerns by arranging in advance for a divestiture.

"In addition, a takeover proposal may be made by one person or a number of joint bidders."

Do you not think that that last sentence beginning "in addition" fairly read offers an alternative basis for the disclosure made in this case?

THE WITNESS: It's possible a reader could so interpret it. That wasn't the intent. And, your Honor, we didn't necessarily feel obligated in this response to set forth all the full rationale as to why Guidant was comfortable that its conduct was consistent with the merger agreement. We were responding to what we thought was a very troubling and hard-to-understand communication as of January 23 given all the facts and circumstances prior to that date.

THE COURT: What is puzzling to me is why would you not say the rationale that you were relying on but specifically address a rationale you were not relying on?

THE WITNESS: Well, the point that was being made acknowledging other points could have been made and maybe with hindsight it would have been more direct to say they're a representative of Boston Scientific, and that's it. The point that was being made is that the merger agreement did not by its terms prevent two parties, like Boston Scientific and Abbott, from working together to formulate a takeover proposal that the Guidant board could find to be superior.

And, therefore, the benefit of the bargain -- what Johnson & Johnson was entitled to when they signed this merger agreement, they were not deprived of the benefit of the bargain. What ultimately resulted was capable of happening a number of ways consistent with the provisions of the merger agreement they negotiated and entered into.

THE COURT: But those ways would have required disclosure of Abbott.

THE WITNESS: One way would have required disclosure of Abbott, yes, your Honor.

THE COURT: You were aware, were you not, that Abbott made clear they didn't want to be disclosed early and would likely not have participated if they had to be disclosed to J&J early? You're aware of that?

THE WITNESS: I'm aware that they initially did not want to be disclosed, your Honor. What we don't know is that if we took the position Abbott had to identify itself as a maker of a takeover proposal before we would give it due diligence, Abbott would have had a business judgment to make and they may well have changed their minds and decided on a risk-reward basis, they'd rather risk some friction with Johnson & Johnson because they were of a view that the Boston Scientific proposal was likely to be able to succeed if they participated in it, and that they, Abbott, were quite desirous of the buying the VI and ES business of Guidant.

If they were given a different set of alternatives, they would have had a different business judgment to make, and I think it highly probable they would have decided they would identify themselves as the maker of a takeover proposal.

As this went forward, they clearly knew they were going to be identified as a party to a Boston Scientific proposal, and whatever friction or unhappiness that was going to cause between the relationship of Johnson & Johnson and Abbott, it was going to happen.

THE COURT: Well, maybe; maybe not. Maybe they would have said we can't get the due diligence, then find yourself another purchaser. Again, this sounds like "if Eleanor Roosevelt could fly."

Next question.

BY MR. BOIES:

Q. Were there other instances in which Abbott did not want Guidant to make a disclosure, told Guidant it did not want Guidant to make a disclosure to Johnson & Johnson, but Guidant went ahead and made that disclosure and Abbott continued the process?

A. Well, I'm not sure if I recall the specifics, but I think initially when we requested the Boston Scientific/Abbott agreement from Boston Scientific, they expressed some reservations or concern about providing it or us providing it to -- providing it to us and us providing it to Johnson & Johnson.

Q. With the Court's permission, let me hand you a copy of what's been marked Defendant's Exhibit 184.

Can you explain to the Court what this document relates to?

A. This document is reporting on the chain of events I just spoke about. When we received the definitive Boston Scientific offer on January 9, part of the transaction involved Boston Scientific selling the Guidant business to Abbott simultaneous with the closing of Boston Scientific acquiring Guidant. We asked Shearman & Sterling for the Boston Scientific/Abbott transaction agreement, and they gave it to us and we indicated we were going to give both agreements, i.e., the Boston Scientific/Guidant agreement and the Boston Scientific/Abbott agreement to Johnson & Johnson pursuant to the provisions of the merger agreement.

THE COURT: This is already after you've announced Abbott or Abbott has been announced as the divestiture partner, right?

THE WITNESS: Yes, your Honor.

THE COURT: OK.

Q. Even though it was after that had been announced, what was Abbott's position with respect to whether the agreement itself should be presented?

A. Well, Shearman's concern was they would have preferred or didn't want us to give the Boston Scientific/Abbott agreement to Johnson & Johnson, but we did.

THE COURT: But, again, the point earlier in the process in December was that Abbott did not want the fact that they were considering being the divestiture partner disclosed to J&J, correct?

THE WITNESS: Correct.

THE COURT: By January 9, it had been disclosed that they were going to be the divestiture partner, correct?

THE WITNESS: Correct, your Honor.

THE COURT: All right.

BY MR. BOIES:

Q. As you understood it, in late December 2005 and early January of 2006, if you had disclosed Abbott as a joint bidder, was there anything legitimate that Johnson & Johnson could have done at that time with that information?

A. Well, I'm not sure what they would have done with it. They would have been aware of it, but as of late December we did not have an actionable or a proposal from Boston Scientific that we could accept; therefore, there was no occasion for us to give notice to Johnson & Johnson that we had a superior proposal that we were going to accept after the five business day notice ran unless Johnson & Johnson raised their bid.

So Johnson & Johnson being aware that Abbott was the maker of a takeover proposal wouldn't have precipitated them taking any action because they hadn't received any notice from our part that would have called for them to take action or risk losing the deal.

THE COURT: But they might have leaned on Abbott to not be a divestiture partner with you, right?

THE WITNESS: Well, they might have, your Honor.

THE COURT: They had relationships with Johnson & Johnson at this point, right?

THE WITNESS: Yes, your Honor.

THE COURT: Over licensing and other things, correct?

THE WITNESS: If Johnson & Johnson purchased Guidant, Abbott was going to -- Abbott had agreements with respect to Johnson & Johnson and Guidant as part of the antitrust issues that Johnson & Johnson had to solve. Either purchaser, Johnson & Johnson or Boston Scientific, created an opportunity for Abbott to acquire assets or intellectual property that they wanted to acquire.

THE COURT: OK. Go ahead.

BY MR. BOIES:

Q. Did you understand that a purpose of the notice provision to keep Johnson & Johnson informed was to permit Johnson & Johnson to lean on prospective participants in preparing a rival bid?

A. No.

THE COURT: Well, would Johnson & Johnson have been free to just say: "Forget you, Abbott; we will now go to Medtronics or somewhere else because you've demonstrated yourself to be a pretty duplicitous partner?"

THE WITNESS: Your Honor, I don't know at the time whether Abbott had a signed agreement with Johnson & Johnson relating to the acquisition of assets or intellectual property once Johnson & Johnson acquired Guidant. If they had a signed contract, your Honor, Johnson & Johnson could have been unhappy, but they couldn't have done anything about their unhappiness. They would have had a contractual right to what it is they wanted to buy.

THE COURT: I guess it depends how the contract was written, but you certainly did know that Abbott did not want their involvement disclosed until after they got the due diligence and after they were ready to sign a deal with Boston Scientific and Guidant, correct?

THE WITNESS: Yes, your Honor. That was their preference.

THE COURT: That was their preference. Well, I mean, that's the way it played out, right?

THE WITNESS: That's the way it played out, but we never tested -- as we've said, your Honor, we never tested the proposition how they would have acted had they been given the choice to be either the maker of a takeover proposal or not get any due diligence.

BY MR. BOIES:

Q. Did Johnson & Johnson in response to Mulaney Exhibit 25, or otherwise, say to you that one of the ways that they have been damaged by not giving notice of a joint bid or notice of Boston Scientific's participation was they had been deprived of the

ability to attempt to influence Abbott not to participate?
A. No.
Q. Did Johnson & Johnson either before or after Mulaney-25 ever say in words or in substance to Guidant that Johnson & Johnson believed that they had suffered any material harm as a result of the disclosure of information to Abbott without telling Johnson & Johnson they were doing it?
A. They never complained of the lack of notice as to Johnson & Johnson receiving due diligence information.
Q. ,Now we talked yesterday, and you talked with counsel on cross-examination, about the insertion of the words "in all material respect" as a limitation that Guidant wanted to have in the merger agreement. Do you recall that generally?
A. Yes.
Q. What was the reason that you wanted to have that limitation added to the agreement?
A. I wanted there to be some rule of reason as to what types of developments or communications were of the sort that we had to promptly tell Johnson & Johnson. We assumed that if we received a takeover proposal, there would be a lot of interaction between us and the party making the takeover proposal, and the question is how many of those communications had to be relayed to Johnson & Johnson. The overall goal of this provision is before we -- is to give Johnson & Johnson what has been termed the last look. Before we can terminate

the agreement we have to give them notice we're prepared to do so, and they have five business days to make a business judgment as to whether they want to raise their bid or otherwise change the terms of their agreement.

Q. Going back to paragraph five of your letter where you said it was "both reasonable and appropriate for Boston Scientific financing sources to have access to due diligence information." Did Johnson & Johnson ever take the position that a financing source was not a legitimate recipient of information as a representative?

A. No.

THE COURT: Is a divestiture partner necessarily a financing source?

THE WITNESS: They weren't -- I guess it depends on whether you need the proceeds of the divestiture to finance the transaction. In this case, Boston Scientific made it very clear that the over $4 million of proceeds that they would get in the divestiture to Abbott was a critical part of their financing above a $25, $26 billion transaction.

THE COURT: So what would it mean to be a joint bidder then that would be different from what was contemplated here?

THE WITNESS: What it would have meant is we would have formally identified Abbott as a party making a takeover proposal, and then notice would have been given of that fact, and the --

THE COURT: But how would the role have been any different than what was contemplated here as a financing source? They were going to take the businesses that created antitrust problems. They were going to pay money for those, and that money was going to be used to finance the transaction. Why is that not a joint bid with Boston Scientific?

THE WITNESS: Well, it very much is in substance, your Honor, and the Guidant board of directors in evaluating Boston Scientific's proposal wanted to thoroughly understand the Abbott transaction as a component of it.

THE COURT: So maybe you were right in your letter, maybe this was a joint bidder situation.

THE WITNESS: Well, it was a joint bidder situation in all but we did not give formal notice to Johnson & Johnson that Abbott was a joint bidder.

THE COURT: Well, clearly, you didn't do that.

THE WITNESS: Correct, your Honor.

THE COURT: So that would have been a breach of the agreement. So the only reason they're not a joint bidder because if they were considered a joint bidder, you would have breached the agreement by not giving notice?

THE WITNESS: Yes, your Honor.

THE COURT: Well, I mean, I was almost being facetious. In other words, you're telling me that the reason you decided they were not a joint bidder is because you hadn't given notice to J&J under 4.02(C).

THE WITNESS: Well, we were very much aware that in substance they were a joint bidder. We were aware that was an alternative theory on which information could be given to Abbott. But as I said to Mr. Kury, we're comfortable with the rationale, we don't have to go to the joint bid rationale, but, your Honor, I candidly acknowledge that if we wanted to pursue the theory that they were joint -- that they were the maker of a takeover proposal, we should have given Johnson & Johnson formal notice. We didn't. But if we did, nothing else would have changed. They would have proceeded as they did proceed.

THE COURT: You indicated this was a rhetorical point being made in your letter about the joint bidder.

THE WITNESS: Yes, your Honor.

THE COURT: Did your client understand that to be the case?

THE WITNESS: I believe so, your Honor, because our discussions focused on the rationale that Abbott was a representative of Boston Scientific and as such could be provided due diligence information.

THE COURT: So then go to Kury Exhibit 57 which is an email from Mr. Kury to you and Mr. Duwe that says, "But, seriously, folks, what is the technical analysis of whether A is a bidder?" What did you understand him to be asking about?

THE WITNESS: I understood him to be asking what is the technical analysis as to whether or not Abbott is the maker of a takeover proposal.

THE COURT: Well, did you say to him "no, no, no, that was just a rhetorical point in my letter. We are not saying they're a bidder"?

THE WITNESS: I said --

THE COURT: "They're a representative"?

THE WITNESS: I said in substance to him, your Honor, they're the maker of a takeover proposal in every sense except we didn't formally give Johnson & Johnson notice of that fact, and the rationale on which we were providing them diligence information is that they are a representative of Boston Scientific.

THE COURT: That is what you said to him after this email?

THE WITNESS: Yes, sir.

THE COURT: What did you say to him before this email? Did you disclose to him before this email that the joint bidder line was just a rhetorical flourish?

THE WITNESS: Well, I sent him the proposed response.

THE COURT: Right. And he signed it, right?

THE WITNESS: Yes, your Honor and in --

THE COURT: Before or after this email "but, seriously, folks"?

THE WITNESS: I believe after.

THE COURT: You believe he signed it after.

THE WITNESS: Yes, your Honor.

THE COURT: So he sent you this email saying "what is the technical analysis of whether A is a bidder" and you explained that's a rhetorical flourish, and then he signed the letter.

THE WITNESS: Well, I don't know if I used the word rhetorical or rhetoric with him at all so much as saying they are the maker of a takeover proposal within the broad definition of that term in the merger agreement, but we didn't give Johnson & Johnson notice of that fact and have been relying on the rationale that they are a representative of Boston Scientific and, therefore, may be provided due diligence information.

And I think I testified yesterday, your Honor, that in December of 2005 after we signed the Boston Scientific confidentiality agreement which contemplated the information to a divestiture candidate before we knew the specifics of how that might unwind, I said to Bernie, one way this could play out is that there will be a -- someone else will join in making the takeover proposal as the divestiture candidate and could be the maker of a takeover proposal given the broad definition of takeover proposal that had been negotiated in the agreement.

So, various ways to get to the same end point were discussed, your Honor.

THE COURT: Go ahead.
Q. Now, let's just get the time sequence right. Your draft that is Mulaney Exhibit 25 is dated January 24, 12:55 a.m. which I think you already identified is five hours later than the time it was actually sent, correct?
A. Yes.
Q. So this would have been sent at 7:55 p.m. on January 23, correct?
A. I'm not sure of the exact adjustment. I believe Annapolis may have been operating on Eastern Time and Chicago was operating on Central Time.
Q. So that it is either five or six hours depending whether it's Eastern Time or Central Time?
A. I believe so, yes.
Q. So it would either be 6:55 or 7:55 p.m. on the 23rd?
A. Yes.
Q. And Mr. Kury's email; that is, Kury 57, is dated January 24, 2006 at 12:56 a.m. Do you see that?
A. Yes.
Q. That's one minute later. It doesn't show seconds, but the way it is shown here, it's one minute later than your email, correct?
A. Correct.
Q. And that, again, depending on whether you are using Central or Eastern Time, would be either 6:56 p.m. or 7:56 p.m. on the

23rd, correct?
A. Correct.
Q. The letter that you were responding to was a letter that had been received on the 23rd. Is that correct?
A. Yes.
Q. Do you recall what time on the 23rd it was received?
A. I believe after 5:00 Central Time.
Q. So after 5:00 Central Time, you received a Johnson & Johnson letter, and your draft response is an hour or two or two and a half hours, depending on Central and Eastern Time considerations, after receipt of that Johnson & Johnson letter. Is that correct?
A. Yes.
Q. You said in one of your answers that it was your understanding that Johnson & Johnson had itself provided information; that is, Guidant confidential information to Abbott. Do you recall that?
A. Yes.
Q. To the extent that that had been done by Johnson & Johnson, if it was legitimate, it had to be legitimate under the confidentiality agreement between Johnson & Johnson and Guidant, correct?
A. Correct.
Q. If it was legitimate under the Johnson & Johnson/Guidant confidentiality agreement to give that information from Johnson

& Johnson to Abbott, what, if anything, did that say to you in your analysis as to whether it was permissible to give Abbott the information that was given in connection with the Boston Scientific proposal?
A. Well, separate and apart from the rationale that information can be given to Abbott because it was a representative of Boston Scientific, information given to Boston Scientific could be shared by Boston Scientific with Abbott under the appropriate confidentiality protections consistent with the merger agreement obligations to provide information to Boston Scientific in compliance with the confidentiality provisions of the confidentiality agreement which is the Johnson & Johnson confidentiality agreement.
Q. Let me ask you, with the Court's permission, to look at Mulaney Exhibit 17, which I am going to hand up. This has an email from Skadden to Arnold & Porter. And Arnold & Porter was antitrust counsel for Boston Scientific, correct?
A. Yes.
Q. And you were shown as receiving a copy of this. Do you see that?
A. Yes.
Q. Do you recall receiving a copy of this?
A. I don't know that I recall it, but I clearly did.
Q. Let me ask you next to look at @Marino Exhibit 3. Now, Marino Exhibit 3 is an agreement between Abbott and Cordis

Corporation?
A. Yes.
Q. What is Cordis Corporation?
A. A subsidiary of Johnson & Johnson.
Q. And there is a portion of this that I want to direct your attention to. It is going to take me a moment. It is obviously highlighted on the screen. You see at the very first page, the very top it talks about "In connection with your and our consideration of a possible business arrangement or other transaction involving Cordis Corporation, its parent entity, Johnson & Johnson, and other affiliates, Abbott Laboratories and Guidant Corporation and its affiliates, Cordis and Abbott may disclose to one another certain nonpublic information concerning their respective business, financial condition, operations, assets and liabilities, and in the case of Cordis certain nonpublic information relating to Guidant."
Do you see that?
A. Yes.
Q. What significance, if any, does that have to what you were testifying to earlier about your understanding that Johnson & Johnson was furnishing Guidant confidential information to Abbott?
A. It says to me that Johnson & Johnson read and understood the confidentiality provisions of the Johnson & Johnson confidentiality agreement the same way I testified to, and that

as long as safeguards with respect to the information were maintained, information Johnson & Johnson had about Guidant could be shared with third parties.

Q. When Guidant information was shared with Abbott in connection with the Boston Scientific takeover proposal, were those safeguards that you refer to with respect to how the information was maintained, were those safeguards in effect?

A. Yes.

Q. Let me ask you to look at Kury Exhibit 68 which is in the cross binder that you were given on cross-examination.

A. I have it.

Q. You were directed to a number of portions of this, including the portion at the top where it says "due diligence will not begin until there is a definitive SPA between Boston Scientific and what is referred to hear as Grape".

What was your understanding of what Mr. Stoll was talking about in this connection? Did you have an understanding?

A. Well, Mr. Stoll appears to evidence via @LV expectation that the negotiations of a divestiture will occur after a definitive agreement is signed up between Bean, Boston Scientific, and Grape, which is Guidant.

Q. Did you have any conversations with Mr. Stoll about why he had that understanding?

A. Not that I recall.

Q. When did Guidant first furnish a draft Boston Scientific Guidant agreement to J&J?
A. I believe late December.
Q. Would you look at Kury Exhibit 36?
A. Yes.
Q. Is this an email that was sent or a copy of an email that was sent to Johnson & Johnson representatives on December 31, 2005 that attaches a draft Boston Scientific/Guidant merger agreement?
A. Yes.
THE COURT: What does SPA stand for?
THE WITNESS: Stock purchase agreement.
THE COURT: Stock purchase agreement. OK.
Q. Does this agreement that was furnished to Johnson & Johnson indicate whether or not it is contemplated that there will be a divestiture partner in place prior to the signing of any agreement?
A. I don't recall because as I said yesterday, I haven't read this agreement in a long, long time.
Q. Let me ask you to look at some handwritten notes. These have not previously been marked, but we are going to mark them as Defendant's Exhibit 218.
Now, you had mentioned when we were talking about the issue of disclosing Abbott's identity that you believed that there had been a discussion of that back in December. Do you

recall that?
A. Yes.
Q. Just as a preliminary matter, have you ever seen these notes before?
A. Yes, I have.
Q. Do you know whose notes they are?
A. I believe I was told they're the notes of a person that was an antitrust associate at Skadden at the time in question.
MR. COFFEY: Do we have a name?
Q. Do you know what the name was?
A. I do not.
Q. Linda Cennedalla, is that a person that you recall, Mr. Mulaney?
A. As of now, I don't recall.
Q. Let me ask you to look at the second page of these notes which purport to be of a series of calls on December 14, 2005. It bears the Bates number ending 976. Do you see that?
A. Yes.
Q. There is a reference to a 3:00 p.m. call. Do you see that?
A. Yes.
Q. There are some numbers there, 866-637-2663. Do you see that?
A. Yes.
Q. Do you recognize that number at all?
A. No, I assume it was the dial-in number for the call.

Q. Then there are a series of names and initials that are there?
A. Yes.
Q. Do you recognize any of those other than your own?
A. Yes, Bernie would be Bernie Kury. NRS would be Neal Stoll. IGJ would be Ian John. Clare would be Clare O'Brien of Shearman & Sterling. Lyons would be Peter Lyons, partner at Shearman & Sterling. PW I'm not -- I don't know that I recall. Larry I assume -- I don't know who Larry was. John Capek was an officer of Guidant. Diane (sic) Feinstein is an antitrust attorney in Arnold & Porter.
Q. If you look then at the bottom of the page, like four lines up, do you see where it raises the question whether name need to be disclosed to Johnson & Johnson?
A. Yes.
Q. And then there are the initials CM?
A. Yes.
Q. Does that stand for you?
A. I assume it does.
Q. Then it says, "Preliminarily don't think we need to disclose." Do you see that?
A. Yes.
Q. Did you say that in words or in substance on or about December 14, 2005?
A. I don't recall. It's possible I did. It was consistent

with my belief at the time, but I don't recall this telephone conversation.

MR. COFFEY: Perhaps the record should reflect that the arrow from CM points to the sentence above, not to "preliminarily don't think we need to disclose." Maybe that will assist the witness in recollection.

Q. Does that assist you at all in determining who said they believe "preliminarily don't think we need to disclose"?

A. No.

Q. I think you said that the view that you did not need to disclose was a view that you had at or about this time. Is that correct?

A. Yes.

Q. Did anyone disagree with that view?

A. Well, I don't specifically recall the conversation suggesting to me it wasn't a controversial or highly debated point, but I just don't recall this conversation or the specifics of it.

Q. Leaving this conversation aside, do you recall having the view in the middle of December of 2005 that it was not necessary to disclose Abbott's identity?

A. Yes.

Q. Again, leaving this particular conversation aside, do you recall anyone in December who disagreed with your view in that respect?

A. No, I don't recall any disagreement with anyone at Skadden or from anyone at Shearman & Sterling. Indeed, Shearman & Sterling requested that we agree not to disclose potential divestiture candidates, so they clearly were of the view that such a provision was consistent with the merger agreement.

THE COURT: They opined on the merger agreement and what it required?

THE WITNESS: They didn't opine, your Honor, but their interest was to comply with the merger agreement as was ours since they wanted to effect a superior proposal.

THE COURT: So who did you discuss the merger agreement and the terms of the merger agreement with at Shearman & Sterling? Who at Shearman & Sterling said to you "We think non-disclosure is consistent with the merger agreement"?

THE WITNESS: I don't recall a specific conversation, your Honor. I know from going back to December 5, 6, 7 when we negotiated the Boston Scientific confidentiality agreement, the provisions in that agreement, Brian Duwe told me he had discussed with Clare O'Brien at Shearman & Sterling.

THE COURT: And that Clare O'Brien believed that the merger agreement between Guidant and J&J allowed for this disclosure?

THE WITNESS: Allowed for what was in the confidentiality agreement at the time. Now, if you are asking a separate question, your Honor, and that is now that Boston Scientific is requesting that we agree not to disclose potential divestiture candidates, my understanding is I don't recall a specific conversation with someone at Shearman. My understanding was that Shearman was equally desirous of complying with the merger agreement which they had because it was a public document, because they wanted to effectuate a superior proposal and give us the predicate to find a basis to terminate the Johnson & Johnson agreement and to sign their agreement. Their interest in that was consistent with ours. They wanted to be in compliance with the merger agreement.

THE COURT: OK.

Q. Let me turn -- hopefully, this will be the last subject, but, let me turn back just for a minute to the distinction between what Boston Scientific could do with Guidant information and what Guidant could do with Guidant information. That is a distinction that you drew both on cross-examination and you've mentioned it in of answer to some of my questions. Do you recall that?

A. Yes.

(Continued on next page)

Q. Why, if at all, did you believe that that distinction was consistent with what was the intent of the merger agreement and the confidentiality agreements related to it?
A. I understood that the merger agreement did not require or provide that if Guidant gave due diligence information to someone like Boston Scientific, it had to be sure that the information only went to Boston Scientific and its representatives; that Boston Scientific could, if they complied with the confidentiality provisions, share that information with other parties that was used for the purposes required.
Q. And was it your understanding that that was or was not the same view that Johnson & Johnson took of the merger agreement and confidentiality agreement?
A. It was my understanding that it was Johnson & Johnson's view as well, yes.
MR. BOIES: Your Honor, I pass the witness.
THE COURT: Okay. Mr. Coffey?
MR. COFFEY: Thank you, your Honor.
RECROSS EXAMINATION
BY MR. COFFEY:
Q. I'd like to revisit the matter that Mr. Boies just ended on, which is this distinction that you drew between what Boston Scientific could do with information it got from Guidant and what Guidant could do with its information. That distinction, which you say informs you of issues in this case, appears

nowhere in your trial affidavit, right?
A. I think the trial affidavit indicates that information was provided and the merger agreement terms were complied with. The merger agreement terms require that information be provided consistent with the confidentiality provisions of the confidentiality agreement.
So I think the topic was clearly front and center, in terms of my testimony, that what Guidant did was consistent with its obligations under the merger agreement, which include what may or may not be done with the confidential information.
Q. The distinction you drew yesterday -- actually, let's call up testimony yesterday, Page 938, which I believe was just reiterated here at the end of Mr. Boies' examination, and let's make sure we're talking about the same thing.
So on Page 938, yesterday Mr. Boies had elicited from you this distinction -- and let me call out those lines. It's Page 938, Lines 9 through 16. And you made the point yesterday, and again essentially reiterated just now, that once the information gets to Boston, because of how the confidentiality agreement works, it's able to share that with other parties. And then you have the, so long as it protects the confidentiality of the information, the information isn't used for business or competitive purposes, and it's used with respect to helping Boston Scientific formulate a takeover policy; do you see that?

A. Yes. I think the wording is "takeover proposal."
Q. I'm sorry, takeover proposal. You're right.
Now, I'm just going to call those last three things -- I'm going to use shorthand. I'm going to call it use-it-appropriately conditions, all right? So I don't have to always repeat those three things. And as I understand it, then your view is that once the information was in the hands of Boston Scientific, it could share it with anybody who's assisting them there, as long as they abided by the use-it-appropriately conditions, right?
A. That's what the confidentiality agreement provides, yes.
Q. Okay. You'd agree with me that that point appears nowhere in the trial affidavit submitted to the Court in October, right?
A. I don't recall.
Q. And then further down -- Marco, could we go down to the bottom line, 24, highlight that, and over to the next page? You know, never mind. I'm just going to go right to my questions. That's all right.
Now, in effect, what you're saying is that the limitation in 4.02(A) as to whom Guidant can furnish information can be circumvented, as long as that information is funneled through the party making a takeover proposal or its representatives, right?
A. I would not agree with your characterization of

circumvented.
Q. You can get information to someone that way, that you could not get to them if they were not a party or a representative, right?
A. Information could be provided to a party consistent with the merger agreement in the fashion you just indicated, yes.
Q. All right. I'm going to --
A. Put another way, the merger agreement by its terms does not prevent a recipient of Guidant information from sharing that information with other persons, so long as the protected provisions, using your phrase, are maintained.
Q. Okay. So I'm going to identify for purpose of the next few questions one of the other persons who could get information under the scenario. I'm going to call it Acme, okay?
And so Acme isn't the takeover proposer. It's not one of its representatives. It's a non-representative who is assisting the bidder with developing its takeover proposal. Are you with me, Acme?
A. Yes.
Q. Okay. So your view is, notwithstanding the limitation in 4.02(A), Acme can get information as long as the information is provided by the rival bidder, not by Guidant, right?
A. If it's being provided consistent with the purposes we outlined and safeguarded accordingly, yes.
Q. Now, to borrow a phrase from Mr. Boies, let's apply that to

the facts of the case.

Guidant did that, right? It gave information to Boston, which was then passed on to Abbott; that's right, isn't it?

A. As I said yesterday, I'm not specifically aware of the mechanics of how all information went from Guidant to Boston Scientific to Abbott. I believe some measure of information went, as you indicated, from Guidant to Boston Scientific and from Boston Scientific to Abbott.

Q. Right. But Guidant also furnished information directly to Abbott, right? Directly to Abbott?

A. I don't specifically know. If they did so at the request of Boston Scientific, it strikes me as consistent with the merger agreement.

Q. All right. So that's a little tweak on this distinction. It doesn't necessarily need to go to Boston first. It can go directly to Acme simply because the rival bidder says send it directly to Acme. Is that a little footnote to the distinction that we're hearing for the first time?

A. I think it's a common sense elaboration of what the agreement permits.

Q. Now, do you recall that Guidant arranged for Abbott to tour its facilities in Santa Clara, California, in late December 2005?

A. I don't recall.

Q. Do you recall that Abbott was -- senior Abbott people were present and on the phone while Guidant's managers at the Santa Clara facility briefed them with confidential information relating to Guidant?
A. I don't recall.
Q. Do you recall that Guidant gave Abbott direct access to data rooms hosted in your offices in Chicago?
A. I believe I recall that Abbott was in our offices in Chicago and getting information, yes.
Q. Indeed, Mr. Mulaney, isn't it true that Abbott was given access to competitively sensitive information related to the assets to be divested that was never provided to Boston Scientific itself?
A. That was never provided to Boston Scientific itself?
Q. Yes, sir.
A. I don't know. I can understand why that is possible, given antitrust concerns about sharing information that's competitively sensitive between competitors, and Boston Scientific and Abbott are competitors.
Q. Well, let's call up Best Exhibit 3, Page 0601, which is a transcript of the January 9 call in which Mr. Best of Boston Scientific described the diligence process. You'll see that on your screen, sir.
A. Yes.
Q. And in response to a question about how to ask -- you know,

whether Abbott might have some concerns once they got into the information, Mr. Best said he would explain the due diligence process. As you can imagine, Guidant was very protective of their program, right? There you go. In terms of our doing due diligence, meaning Boston's, and then he says, Boston had the opportunity to do a certain level of due diligence. Do you see that? Do you see that, sir?
A. Boston had the opportunity to do what?
Q. Let's go back, Marco.
A. I don't see that Boston opportunity line.
Q. Okay. We -- we had an opportunity; do you see that?
And then the next sentence it refers to what Abbott had the opportunity to do; do you see that?
A. Yes.
Q. And it said: Abbott had the opportunity to do a much deeper dive on due diligence, right?
And that's because Abbott was able to see things that Boston was prohibited from seeing, correct?
A. I don't know. I know what it says.
Q. Let's go to Kury Exhibit 2, please.
A. I'm sorry?
Q. Kury Exhibit 2, please. Now, there were some questions posed yesterday about what constitutes the confidentiality provisions, in your view, of the J&J confidentiality agreement. I just want to get on the record which paragraphs you think

constitute the confidentiality provisions of this confi; so bear with me.

I take it from your testimony you would not say the first paragraph is a confidentiality provision, right, because that includes the definition of representatives?

A. That's right. The first paragraph says that there will be people that will be providing information, and there will be people that will be receiving information.

Q. Right. So your testimony is the first paragraph is not a confidentiality provision of the Johnson & Johnson confi, right?

A. Correct.

Q. Is the next paragraph, a confi provision?

A. So no part of the first paragraph. Correct. It defines some terms that are used in confidentiality provisions, but there's nothing in the first paragraph as to confidentiality provisions of the agreement, i.e. how the information is to be treated, held, used, not used, shared, not shared.

Q. But includes some terms that are used in the confidentiality provisions you say, right?

A. Yes, like the definition of information or representatives.

Q. Okay. So if the definition -- if the term representatives has been defined because it will be referred to in subsequent paragraphs that you say are part of the confidentiality provisions, how is it that representatives is not part of the

confidentiality provisions of this agreement?
A. The first paragraph does not provide some rules of confidentiality or use of the information provided by some people to other people. There's no operative prohibition, restriction, rule, conduct set out in the first paragraph.
Q. All right. Nothing in here, in your view, says how it should be handled, right?
A. Correct.
Q. All right. So let's finish this exercise. The paragraph that begins on the bottom of this page, is that what you would consider a confidentiality provision of this agreement?
A. Yes.
Q. The top of the next page, the paragraph that begins "in the event," is that a confidentiality provision?
A. Yes.
Q. The paragraph below it that starts "if we do not proceed with any business arrangement," is that a confidentiality provision?
A. Yes.
Q. The paragraph below that that refers to what I might call a standstill provision, is that part of the confidentiality provisions?
A. No.
Q. And now the top of the next page, the first full paragraph that begins "for a period of 15 months," is that a

confidentiality provision?
A. No.
Q. The paragraph after that that begins "each party acknowledges," is that a confidentiality provision?
A. No.
Q. In the paragraph below that, is that a confidentiality provision?
A. Well, in the sense it references -- I guess the answer is no. It references trading and securities.
Q. The top of Page 4 of the document, it begins "without prejudice to any rights," do you consider that to be a confidentiality provision?
A. No.
Q. Are any of the remaining four paragraphs on this page a confidentiality provision, in your opinion, sir?
A. No. Not as the term is used in the merger agreement, no.
Q. All right. So as I understand your testimony, pursuant to this agreement, Boston could get information, as long as it abided by the use-it-appropriately conditions; Boston's representatives could get information as long as they agreed to abide by the use-it-appropriately conditions; and my hypothetical Acme, if Acme is going to help Boston, it too can get confidential Guidant information provided that it agrees to abide by the use-it-appropriately conditions; is that right?
A. And if the -- if Acme is being given the information

consistent with the purposes of the agreement, i.e. exploring possible negotiated business arrangements.

Q. Okay. So now --

THE COURT: So why do you need to define representatives? I think I asked this question yesterday, but why is it necessary to define representatives if the limitation on use is sufficient to prevent any misuse?

THE WITNESS: Well, because representatives is used in other ways in this agreement, your Honor, such as neither you nor your representatives will make public the fact that we're entering into discussions or that discussions are taking place, et cetera; i.e. no public disclosure because Johnson & Johnson and Guidant are negotiating confidentially and they're both public companies and didn't want to leak that they're talking about a possible transaction. So representative is operative that way.

THE COURT: So but the third paragraph, which you said is a confidentiality provision, references representatives?

THE WITNESS: Yes.

THE COURT: So someone who is not a representative wouldn't be bound by that, in your view?

MR. COFFEY: You're stealing my thunder, Judge.

THE COURT: I'm sorry. I take liberty because I'm the fact finder. Go ahead.

MR. COFFEY: No, I apologize, your Honor.

BY MR. COFFEY:
Q. So in that paragraph that the judge referred to, and actually you mentioned yesterday that -- you actually refer to third-party subpoenas.

So in this scenario, if Boston, as a party, were to get a subpoena, it has to let Guidant know, right? So that Guidant could have an opportunity to seek a protective order, right?
A. Yes.
Q. That's an obligation under this confidentiality provision. And if one of Boston's representatives would serve a subpoena, it too would have to advise Guidant, right, because that's what this says, if the parties or its representatives gets a subpoena, it's got to give Guidant notice, right?
A. Yes.
Q. But if Acme got a subpoena, it's under no obligation to give Guidant because it's not a party or representative; isn't that right?
A. It depends on what agreement was entered into with Acme when the information was provided to them.
Q. Maybe they just signed an accession agreement, which says we agree to be bound by the Boston Scientific confidentiality agreement?
A. Well, it may be lots of things, but if the agreement is given to Acme with a confidentiality agreement, providing that

the information is to be treated confidentially, not used for other purposes, et cetera, et cetera, then the issue you're raising is handled by that agreement.

Q. Well, this says -- the specific language of one of the, I think, three paragraphs you've identified as confidentiality provisions specifically says, in the event either party or any of its representatives, et cetera, receives a subpoena, it must do something. But that, by definition, doesn't cover Acme, does it?

It doesn't say, in the event either party or any of its representatives or anybody else who the party has given information to, subject to them abiding by the use-it-appropriately conditions, is required by law to disclose it; it doesn't include this catch-all "anybody else who comes to play" species of party that you refer to, does it?

A. I direct you to the second paragraph of the letter and the second sentence says, the information will be kept confidential in accordance with the terms of this agreement.

THE COURT: Well, read the third sentence.

THE WITNESS: And without the prior consent of the other party, neither party will disclose.

THE COURT: Neither party, nor its representatives will disclose; so....

THE WITNESS: Yes, but the disclosure isn't the issue at this point, your Honor. We're talking about the information.

THE COURT: Well, the point is, what's being referenced there is a limitation only on the parties and their representatives.

THE WITNESS: Yes, but I'm pointing to the second sentence, saying there's a limitation, period, as to how the recipient of the information can use it, and the recipient of the information will be kept confidential in accordance with the terms of this agreement.

THE COURT: Go ahead. I don't want to steal your thunder.

MR. COFFEY: I'm ready to move on, your Honor.

BY MR. COFFEY:

Q. I want to revisit the testimony you gave late yesterday, when Mr. Boies was examining you, about Johnson & Johnson's interest in having the definition of representatives in 4.02(A) be as broad as possible; do you remember that?

A. Yes.

Q. Let's call up part of that testimony, Page 929, starting at Line 13, all the way down through 930, 18, just the block. Now, okay, Marco, we need to start at Line 13. No, no, not highlighted. I want a box. Line 13. Then you need to pull over from 930, all of it down through Line 18, please. There you go.

Now, you were asked, why wasn't Johnson & Johnson's

interest to have the definition of representatives be very broad, and you did an analysis there. And the point, I take it, being to suggest to the Court that Guidant's view that representative should be broadly construed ultimately to cover Abbott, is more sound than Johnson & Johnson's view, which is the language doesn't provide for it. Isn't that the point of this analysis?
A. It's one of the points, yes.
Q. You'd agree with me, sir, that this analysis appears nowhere in your trial affidavit, right?
A. No, I would not agree. The trial affidavit indicates that "representatives" is a broadly defined term, and this is further consistent in an elaboration of the breadth of that definition. And I indicated that the broadly defined term "representatives" was consistent with Guidant's intent in being able to talk with the maker of the takeover proposal and get a higher bid and accept a higher bid.

If Johnson & Johnson didn't want to meet it, that was one of the quid pro quos of dealing with Johnson & Johnson exclusively. And the breadth of that definition of "representative" was consistent with a lot of flexibility on Guidant's part in responding to the maker of a takeover proposal, and the breadth of that -- but the breadth of that freedom is a function of the definition of representative within the agreement, which is quite broad, and is defined in the first instance for the benefit of Johnson & Johnson.

And Johnson & Johnson's intent is that Guidant and its representatives, by which I understood to mean anyone working with Guidant --

Q. But my point is --

A. -- cannot solicit an offer.

Q. But the point you were making here was about Johnson & Johnson's intent in having "representatives" broadly defined for the purpose of limiting, dramatically limiting the opportunity for someone to create mischief and go out and solicit another bid; that's the point you were making here, right?

A. Among others, yes.

Q. Right. That precise point is not in your trial affidavit; isn't that right?

A. Well, what's in my trial affidavit --

Q. Sir, that precise point is not in your trial affidavit, right? Yes or no?

A. No.

Q. Now, what is in your trial affidavit -- well, let's call up the references to Johnson & Johnson's intent, the highlights. Marco?

THE COURT: You're on redirect or are you talking about trial affidavit?

MR. COFFEY: No, no, from 938. Marco, let's bring it up. No, no. I'm so sorry, Marco. My apologies, 929, where we were just now, and if you could also -- yes, that's the right one. Go back to that, Marco, please. All right.

Q. You'll see on the screen at the top the question was, why was it in Johnson & Johnson's interest, and then the next paragraph of the question to which you responded, refers to Johnson & Johnson's intent. And then the question at Line 12, what was Johnson & Johnson's incentive; do you see that?

And then you have an answer that we understood them -- "them" being Johnson & Johnson -- and we understood the term representatives to be defined very broad. And, again, the reference to the purpose, so that they may not solicit a superior proposal. Do you see that?

A. I'm reading. Yes, I see it.

Q. But you have no basis whatsoever to opine on what Johnson & Johnson was thinking with regard to the definition of representative, right? Because you affirmatively disclaim in your trial affidavit any recollection of that topic, right?

A. No, that's not a fair statement. I said I don't recall specific discussion of the term representatives in negotiating it with Mr. Townsend of Kravath, but I do understand the intent of a purchaser like Johnson & Johnson writing a no solicitation clause, and that is to achieve the purpose of requiring Guidant and anyone working with them to be passive and not to solicit.

Q. Let's call up Paragraph 7 of the trial affidavit, which is

PX167. You just, in your answer, said you don't specifically recall, but let's look at what you said in your trial affidavit. It's on Page 4, Paragraph 7, sixth line down, the one that says "I do not recall."

And, Mr. Mulaney, I'd like you to read along and see if I read this accurately: "I do not recall discussions or negotiations between the parties with respect to the definition of 'representatives' in the confidentiality agreement." That's all I need, Marco. Did I read that correctly?

A. I believe you did, yes.

Q. So that deals with the confi. Let's turn to the merger agreement. Paragraph 8B on Page 6. And let's see here, the end of Line 6 begins with the word "the," right? So I'd ask you to read along to make sure I've read this correctly.

You state in your trial affidavit, "The definition in the merger agreement was drafted by Kravath, counsel to J&J and like the definition of that term in the J&J confidentiality agreement, it was not to my recollection a subject of discussion between the parties." Did I read that correctly?

A. Yes, you did.

Q. To the extent you were opining yesterday about Johnson & Johnson's interest, that's speculation, sir, because you have no recollection of that even being discussed, right?

A. No, that is not correct. There's a distinction --

Q. You have a recollection?

A. If I could finish my answer.

THE COURT: Let him finish.

A. There's a distinction specifically between recalling and negotiating the category or the definition of representative, on the one hand, and on the other hand, understanding Johnson & Johnson's intent, as we negotiated 4.02(A), in providing that Guidant and its representatives by which I understood to mean anyone working with Guidant could not solicit.

That's what the no solicitation clause is trying to accomplish in the first instance, no solicitation by Guidant and no solicitation by anyone working with Guidant.

Q. But you testified yesterday that the Johnson & Johnson objective to be achieved there would be carried out through making the definition of representative as broad as possible; isn't that right?

A. Yes.

Q. But you have no recollection of any negotiations or discussions with Johnson & Johnson about the definition of the term representative; isn't that right?

A. Yes, but it doesn't mean that the definition isn't broad and expansive, as I've so testified, and it doesn't mean that the breadth isn't consistent with the intent of a purchaser to achieve an effective no-solicitation clause.

Q. All right. Let's call up DX183, which you were just shown this morning. I just want to clarify something. This was put up in a line of questioning which suggested that Abbott -- there came a point where Abbott was resisting providing a copy of the Boston Scientific/Abbott transaction agreement to J&J, and you were shown this document, and I just want to clarify. There's reference to Shearman and their objection.

Now, Shearman was counsel to Boston Scientific, not Abbott, right?

A. Correct.

Q. So it was Boston Scientific that was objecting to providing a copy of the transaction agreement to J&J, right?

A. My memory is Shearman was objecting, but part of the basis for the objection was that, the preference by Abbott.

Q. And was that because Abbott -- well, withdrawn.

All right. So this e-mail refers to -- withdrawn.

This e-mail doesn't make any reference to Abbott having an objection at this point, right?

A. Not by its express terms, no.

Q. Now, Boston had, earlier in the day, sent its proposal, its takeover proposal -- withdrawn.

Boston, earlier in the day, had sent its firm offer to the Guidant board, right?

A. They supplied their offer on January 9th, yes.

Q. And they understood that Johnson & Johnson would thereby, that day, become aware of this firm offer and that Boston -- the terms of the Boston offer, right?

A. Yes, and that we would be providing Johnson & Johnson with the agreement and documents they gave us.
Q. Right. But what they didn't want you to give to Johnson & Johnson that day was the Boston/Abbott transaction deal, right?
A. Yes. They would prefer that we not, is my recollection.
Q. Right. And didn't they say to you, you don't need to give it to them because that's not part of our takeover proposal?
A. I don't recall.
Q. In any event -- withdrawn.
Now, yesterday, in response to a question from Mr. Boies, you made reference to section 5.02 of the merger agreement, and indicated in your answer that that -- the language thereto affected your views of how the confidentiality agreement should be interpreted; do you remember that?
A. I believe my testimony was that after Johnson & Johnson signed the merger agreement, they still were subject to the Johnson & Johnson confidentiality agreement.
Q. You'd agree with me that this reference to 5.02, as an additional basis for your testimony on these issues, appears nowhere in your trial affidavit, right, Mr. Mulaney?
A. Could you repeat the question?
Q. You'd agree with me that this reference to 5.02, as an additional basis for your testimony on these issues, appears nowhere in your trial affidavit?
A. The reference to 5.02 is not an additional basis for my

testimony. It's a reference to the fact -- my testimony that sprung -- that related to 5.02 was to clarify that Johnson & Johnson was subject to the confidentiality agreement even after they signed the merger agreement. That wasn't the basis upon which I explained why Guidant's conduct was consistent with the merger agreement. They are two distinct points.
Q. Now, yesterday during my examination and then again this morning with Mr. Boies, you've made reference to Johnson & Johnson giving Guidant information to potential third-party divestiture candidates despite the J&J confi; do you remember those questions?
A. No, not despite.
Q. Or consistent, which would be your view, right?
A. Yes.
Q. But let me extract that out of the question. You've given testimony that, to your understanding, Johnson & Johnson was giving confidential Guidant information to potential divestiture parties while the merger agreement was in effect, right?
A. My understanding was that Johnson & Johnson had given Guidant information to Abbott. That was, I think, the breadth of my understanding. As to other divestiture parties, I don't think I had any understanding.
Q. Well, would you quarrel with me that your testimony yesterday was a bit broader than that; that it gave it to

parties, not just to Abbott?
A. Well, what I understood at the time was they gave it to Abbott, and if asked the theoretical question, could they have given it to parties other than Abbott as potential divestiture candidates, then if they complied with the other protective provisions we talked about, that could happen.
I didn't understand that -- the only thing I understood at the time was that Johnson & Johnson had given information about Guidant to Abbott. That's what I understood.
Q. Now, what did you understand to be the nature of the information that Johnson & Johnson had given to Abbott?
A. I just understood it to be confidential Guidant information, as to which Abbott was aware of before Boston Scientific made its proposal.
Q. All right. Let's call up Murano 3, which you were shown a few minutes before I stood up. Is this the basis for that understanding?
A. No.
Q. All right. Well, let's talk about this document while we have it. There's a reference to providing, in the case of Cordis, which is a J&J subsidiary, "certain nonpublic information related to Guidant," right? Do you see that? It's on the first page, Marco.
A. Yes, I see that line.
Q. Certain nonpublic information -- you've got to go up a

little higher, Marco, a little higher. Okay. On the screen, right. There you go.

Now, that doesn't say that it's going to provide Guidant information, right? It's going to provide information relating to Guidant; isn't that right?

A. It says what it says.

Q. It doesn't say it's Guidant's confidential information, does it?

A. It says what it says.

Q. Right. For all you know, it could be commercial intelligence that had been generated by Johnson & Johnson, right?

A. I don't have an opinion on the topic; so I don't know.

THE COURT: Well, a moment ago you testified about Johnson & Johnson providing Guidant information to Abbott; so --

MR. COFFEY: Confidential.

THE COURT: -- what was the basis -- Well, do you have an understanding that it was information provided by Guidant to Johnson & Johnson which was then transmitted by Johnson & Johnson to Abbott?

THE WITNESS: That was my understanding, your Honor.

THE COURT: And what's that based on?

THE WITNESS: A statement or a communication I had with Ian John, an Ian John communication that when we started

giving information to Abbott, they already had a lot of information about Guidant, and I believe from Johnson & Johnson.
BY MR. COFFEY:
Q. You said a lot of information?
A. Had information about Guidant, yes.
Q. He didn't tell you he had a lot of confidential information?
A. I don't recall specifically what. I understood it to be confidential information.
Q. Okay. So your testimony a few minutes ago, you said you understood they had received confidential information. That source wouldn't have been Mr. John, since you don't recall him saying it was confidential?
A. I understood it to be confidential.
Q. You assumed it was confidential?
A. Yes.
Q. Are you aware that the former vice president of new business development at Cordis, Susan Murano has testified in this case that Johnson & Johnson did not provide Abbott with confidential information about Guidant?
A. No.
Q. In fact -- well, are you aware, to be more specific, that she testified the only information Johnson & Johnson provided to Abbott concerned a family of patents which are publicly

available? Are you aware of that testimony?
A. No.
Q. In any event, are you aware that Guidant specifically gave Johnson & Johnson permission to share that information with Abbott at the time?
A. I thought you first told me Johnson & Johnson didn't give information to Abbott. Now, are you asking me, am I aware that Johnson & Johnson did so with Guidant's permission?
Q. In any event, are you aware that Guidant specifically gave Johnson & Johnson permission to share information with Abbott?
A. But I thought you just asserted to me that Johnson & Johnson did not give such information to Abbott.
THE COURT: Perhaps they didn't, but perhaps they had permission to do so. Are you aware that they had permission to do so?
THE WITNESS: No, your Honor.
THE COURT: Next question.
BY MR. COFFEY:
Q. Now, you were shown this Murano 3, which is a contract and agreement between Abbott and Cordis. I'm going to ask if you recall seeing any other confidentiality agreements that relate to the provision of Guidant information to third parties in the 2005 time frame?
A. I hadn't been aware of this contract until it was handed to me in the course of this trial; so I wasn't familiar with it

previously.
Q. All right. I'm going to show you what's been marked as Rosenberg 27, and it's an e-mail from a person at JP Morgan to Skadden, to several people at Skadden, including your partner Brian Duwe. And if you look through it, there are a series of agreements between JP Morgan -- well, withdrawn. The subject is confi's with potential acquirers of divested assets, European ES; do you see that?
A. Yes.
Q. Did you see this e-mail or these documents in or about December of 2005?
A. I don't recall.
Q. Are you aware that Johnson & Johnson -- withdrawn.
Are you aware that it was Guidant, through its agent/financial adviser, JP Morgan, that was giving confidential Guidant information to these third parties pursuant to separate confidentiality agreements? Are you aware of that, sir?
A. No, I was not.
Q. You weren't aware of that when you made the statements yesterday about Johnson & Johnson interpreting its confidentiality agreement in such a way that it was giving sensitive confidential information to third parties? You didn't know about these agreements, did you, sir?
A. No, I did not.

Q. Let's go to look at 4.02(B) and Kury Exhibit 9. And just to tidy up a housekeeping matter, you'd agree with me that other than -- we're using Kury Exhibit 9, which is the initial merger agreement. Would you agree with me that on all of the substantive things that we've been talking about, the terms are identical in the amended merger agreement, fair?

A. Sorry, all the terms?

Q. Except for the termination and some of the modifications that were done in January? I'm not directing you to this provision.

THE COURT: You're just talking about 4.02?

MR. COFFEY: No, sir.

THE COURT: Are you talking about the entire agreement?

MR. COFFEY: Oh, I'm so sorry. I withdraw it. Let's talk about 4.02(B), please.

BY MR. COFFEY:

Q. Mr. Boies had taken you through the first half of a sentence that we had each focused on, beginning at the bottom of Page 6227 and continuing over to the top of 6228. And do you recall that Mr. Boies took you through basically the first half of it, specifically the words "any letter of intent, memorandum of understanding, agreement in principle, merger agreement, acquisition agreement, option agreement, joint venture agreement, and partnership agreement."

Do you remember he carved those out for a question, and you responded that you viewed those as transactional documents? Do you remember that?
A. Yes.
Q. And then he went on to the next part of it to talk about "or any similar contract constituting or related to or that is intended to or could reasonably be expected to lead to any takeover proposal," and you opined that those were similar to transaction agreements, right?
A. No, I don't think that was my testimony. I think what I agreed with is the word "similar modified contract," and that referred to the previous litany of documents or agreements you read.
Q. All right. So your view of this part of 4.02(B) is that it's intended to prohibit transactional agreements and agreements that are similar to transactional agreements; do I have that right?
A. Yes.
Q. And your conclusion, therefore, is that the oral joint defense agreement that Guidant entered into with Boston Scientific and later Abbott did not run afoul of 4.02(B) because it wasn't a transactional agreement or something similar to a transactional agreement; do I have that right?
A. Yes.
Q. Right. So I want to focus on the balance of this sentence

which says, "(Other than a confidentiality agreement referred to in section 4.02(A)," and then it has a defined term, acquisition agreement. Now, you'd agree with me that -- withdrawn.

You would agree with me that this parenthetical was placed there for the specific purpose of carving out of the prohibition a confidentiality agreement referred to in section 4.02(A), right?

A. It carves it out, right.

Q. And it carves it out because if it didn't carve it out, that would be among the prohibited agreements, right?

A. No, it carves it out to make explicit what I would think is implicit, which is to say that a confidentiality agreement is not of the nature of the foregoing agreements we talked about. And the defined term used in this litany of agreements is an acquisition agreement, consistent with my interpretation of what we're talking about here are transactional agreements, not confidentiality agreements. And a joint defense agreement partakes of the nature of a confidentiality agreement, not an acquisition agreement or not a transactional agreement.

Q. So in your view, this wasn't really necessary to include because, based on the prior words that describe, in your view, transactional documents or something similar, you don't need to say anything about a confidentiality agreement, right?

A. You don't specifically need to. This agreement is full of

provisions that elaborate what, strictly speaking, is not necessary.
Q. And as we've now learned, it also doesn't include a lot of words that might have made the need for this trial moot, right?
A. Correct.
Q. Let's call up Kury 57, please. Now, I'm calling this up because, to follow up on some testimony you gave after the Court referred to this document, and you talked about the conversation you had with Mr. Kury in response to this e-mail; isn't that right?
A. Yes.
Q. Well, do you recall at your deposition that you had no recollection of doing so?
A. I'm not -- I don't recall what was in my deposition on the topic.
Q. All right. Well, why don't you turn to your deposition in the book there and Page 251, and let me know when you're there, sir.
A. Well, I see it on the screen now.
Q. Okay. So beginning at Line 24 -- let me preface it on by saying earlier, on Page 251, Mr. Weinberger had marked Kury Exhibit 57, and now I'll read his question and your answer. And, again, the topic being -- well, withdrawn.
See if I read this correctly.
"Q. After you submitted your draft to him and after the date

of this e-mail, which I understand you don't recall receiving, he says 'I'm reachable until about midnight New York City time.'

"Do you remember providing him any -- even though you may not remember receiving the e-mail, do you remember receiving, providing him with the technical analysis of whether Abbott was a bidder?"

There's an objection. Mr. Weinberger clarifies.

"So I'm not asking you about your earlier conversations with him.

"A. I don't recall."

Did I read that correctly?

A. Yes, you did.

Q. Now, we don't necessarily have to call it up, but you were shown a document that has handwriting?

A. Excuse me, may I elaborate on that answer?

Q. I moved on to another topic.

So you were shown some handwriting and a reference to some handwriting about whether names need to be disclosed to J&J. My question is, as of December 14th, there was no potential bidder -- excuse me. There was no identified divestiture party to disclose to J&J at that point, right?

A. As of the 14th, I don't recall if a specific party had been identified or not.

Q. Now, you testified yesterday and again this morning that,

in connection with Mulaney 25, the e-mail you drafted for Mr. Kury, that you didn't understand why J&J would be complaining about Guidant providing diligence to Abbott, which you viewed as a source of financing, but did not complain about Guidant furnishing diligence to Bank of America or Merrill Lynch; do you remember that?
A. Yes.
Q. But you understood that both Merrill Lynch and Bank of America were financial advisers to Boston Scientific, right?
A. No, I did not understand, as I said yesterday, that Bank of America was a financial adviser to Boston Scientific.
Q. Well, Banc of America Securities was a financial adviser, wasn't it?
A. I don't recall.
Q. Why don't we call up Best No. 10, I believe it is, but let me make sure. Kury No. 10, please.
And this is the e-mail with the surprise Boston Scientific proposal. Let's go to the last page of the letter that was sent by Boston. The last page, Marco, please. Highlight the paragraph.
THE COURT: What exhibit is this?
MR. COFFEY: This is Exhibit Kury 10, your Honor.
THE COURT: In the binder, right?
MR. COFFEY: Yes.
BY MR. COFFEY:

Q. And you see here there's a reference to Banc of America Securities as one of Boston's financial advisers, right?
A. Yes.
Q. And Bank of America NA and Banc of America Securities are affiliated entities, right?
A. I believe they are.
Q. Let me ask you with regard to Bank of America, do you know whether they ever received any confidential Guidant information?
A. I don't know for a fact because I wasn't dealing with them at the time.
Q. All right. So but you found Mr. Deyo's letter bizarre, I think is the word you used, in part because he was complaining about Abbott getting confidential information, yet, not complaining that Bank of America got it. And you said that even though you had no -- you didn't know whether they got it or not?
A. I assumed Merrill and Bank of America got diligence information on Guidant.
Q. Well, let me cut through this. Are you aware that Larry Best testified -- withdrawn. I'm going to show -- All right. Let's call up Best 27, and I don't think I have extra copies here, do I? And let's get Best 29 at the same time. There you go, Mr. Mulaney.
So I've handed you what has been marked as Best

Exhibit 27 and then Best Exhibit 29, and let's turn to 27 first, and it's an e-mail of December 29, 2005, to Larry Best, attachments. It's a presentation, Guidant banking due diligence, and I'll also -- well, with regard to that, are you aware that Mr. Best testified that the information provided to the banks here was Boston information and not Guidant's?

A. I'm not aware of Mr. Best's testimony in this case.

(Continued on next page)

Q. Let's turn to Best No. 29, which is a presentation that was sent around on January 3, 2006. Again, the topic is banking due diligence. And I ask you if you are aware that Mr. Best has testified that the information contained in these materials was exclusively Boston Scientific. Are you aware that he testified to that?
A. I'm not aware of Mr. Best's testimony in this case.
Q. Therefore, you are not aware that he also testified that nothing in these slides was derived from any due diligence Boston had done on Guidant. You're not aware of that either?
A. No.
Q. You had testified yesterday that you wouldn't have expected Mr. Townsend to reach out to you if he believed there had been a breach of the merger agreement or had serious concerns that there was a breach. Do you remember that testimony?
A. Yes, I do.
Q. Now, knowing Mr. Townsend as you do, would you also expect that he would follow the instructions of his clients?
A. Yes.
Q. Now, you are not privy to what Cravath Swaine & Moore may or may not have discussed with J&J management on this topic are you?
A. No, but I'm privy to the fact that after January 9 when Johnson & Johnson believed the merger agreement may have been violated, I negotiated with Cravath two separate, distinct

amendments to a merger agreement. Part of that negotiation involved adjusting the breakup fee increasing it, i.e., the price Guidant would have to pay to Johnson & Johnson if it terminated that agreement and accepted the higher offer, and in negotiating that agreement; and with Johnson & Johnson asking us to enter into an amended agreement, if Johnson & Johnson had the position that we had already breached the agreement and therefore could not properly terminate the agreement for a higher offer, they should have said so because they were negotiating an amended agreement, asking us to sign it and asking us to agree to a higher breakup fee in the course of that agreement. And under the notion that negotiators should be forthright, if Mr. Townsend was of the view that we had already breached the agreement and could not terminate it and would never have proper occasion to pay a breakup fee, he should have told us.

Q. So I take it the answer to my question, the question I posed is no, you were not privy to any discussions between Cravath and J&J management. The answer to that question that I posed is no, isn't that right, Mr. Mulaney?

A. No. Correct. The answer is no.

Q. Correct. The answer is a simple no?

THE COURT: I guess none of us are privy to that, right? Because nobody has waived privilege on that score, right?

Q. Right. But you are inferring from Mr. Townsend's silence that he did not think there was a breach. Isn't that the point you are making with that testimony?

A. The point I'm making with the testimony is --

THE COURT: I think it is a pretty good inference. I am the fact finder, for what it's worth. So Mr. Townsend didn't add anything on that subject.

Q. For all you know, Mr. Mulaney, J&J management might have made a business determination that acquiring Guidant even at a higher price than $63 would add such value to J&J that it was preferable to litigation, right? That could be an explanation for Mr. Townsend's silence, right?

A. No. If Mr. Townsend was of the view that we had breached the agreement and he was negotiating an amendment to that agreement, not once but twice, in each case the breakup fee being increased, the breakup fee was a percentage of the deal value, and he was of the view that we had breached the agreement and had no legitimate basis to ever terminate it and never to pay Johnson & Johnson a breakup fee, then as a forthright negotiator, he should have said so. He did not.

Q. Are you aware that in his testimony, the former chairman of Johnson & Johnson said that he wanted to get the deal done and not litigate. Are you aware of that testimony?

A. I'm not aware of any testimony in this case. No.

Q. Do you have a view as to whether Mr. Weldon and

Mr. Cornelius had a good working relationship over the year plus they had been working on the Guidant/J&J merger?
A. You mean Mr. Weldon or Mr. Deyo?
Q. Mr. Weldon -- sorry, Mr. Weldon.
A. I don't know there was much of a relationship. I think most of Bernie Kury's contact with Johnson & Johnson were through Mr. Deyo.
Q. For all you know, Mr. Townsend may have been instructed to shelf talk of any litigation and get this deal closed, right?
A. If he was instructed to shelf talk litigation, then he was presumably aware of a claimed breach by us and if he was, and he was negotiating a new agreement with us and inducing us to enter into that agreement with a breakup fee that was being increased, and he thought under no circumstances could we lawfully terminate that merger agreement and pay Johnson & Johnson a breakup fee, then he as a forthright negotiator should have said so.
Q. Now, I want to end with going back to this idea that the definition of representatives was intended to be as broad as possible.
Yesterday you came up with a scenario where you wanted to avoid a cute way where someone could retain someone to go solicit a rival bid and by defining representative broadly, you could limit that possibility. Do you remember that?
A. I remember testimony on those topics, yes.

Q. But doesn't 4.02(A) also prohibit solicitation by people retained by the party or its representatives, right?
A. The structure of 4.02(A) is Guidant and its representatives, and then -- representatives is defined already. Then the words are added "retained by it." So you have to be a representative in the first place before your retention subjects you to the prohibition of soliciting. You are a representative in 4.02(A) before you are retained.
Q. There are also the words "or indirectly through another person." And your view is that that would not be sufficient to close off this end run around the non-solicitation. The way to do it was to make representative as broad as possible.
A. Well, clearly, Johnson & Johnson drafted the agreement. They made the definition of representative as broad as possible. The definition of representative was relevant and important to them, and it was -- and, further, there is a sentence or two after that first sentence, the statement we talked about yesterday, that if any representative of Guidant were to breach the agreement, that breach would be attributed to Guidant.
Q. So your testimony, as I understand it, is that based on your understanding from Johnson & Johnson's perspective the definition of representative was relevant and important to them. Is that right? Isn't that what you just said.
A. Yes, as part of the no-solicitation provision. They wanted

a no-solicitation provision that worked; not one that was a piece of Swiss cheese.
Q. So when you said it was important and relevant, you were limiting that to the non-solicit but not to the scope of disclosure of Guidant information?
A. I was speaking of it in the 4.02(A) no-solicitation definition of representative. That's the context in which I was speaking.
Q. Right. But 4.02(A) not only talks about non-solicitation, it talks about what Guidant could do if a triggering event occurred, the superior proposal, right? So it's not just limited to non-solicit. It also talks about the two exceptions to the non-solicit should a superior proposal appear, right?
A. Yes. In both instances the word representative is used, and the question is how do you interpret that word.
Q. And that leaves it in the Judge's court. So I'll sit down. Thank you.

THE COURT: OK. Anything, Mr. Boies?

MR. BOIES: Just a little bit, your Honor.

REDIRECT EXAMINATION

BY MR. BOIES:

Q. Mr. Mulaney, you were asked to look at your deposition at page 251 where you are testifying with respect to some questions concerning Kury 57. I would like you to turn to Kury 57 in your book. This is an email from Mr. Kury that is on its

face dated January 24, 2006 at 12:56 in the morning. Do you see that?
A. Yes, I do.
Q. This is the document that you were shown at your deposition, correct?
A. Correct.
Q. You knew at your deposition that the response to Mr. Duwe's January 23 letter had gone out on January 23, correct?
A. Correct.
Q. That is, had gone out the date before this email?
A. Yes.
Q. Now, let me turn to your deposition, page 251. The question that counsel read to you was at the bottom of page 251 carrying over to 252. The question is:
"Q. After you submitted your draft to him and after the date of this email" -- and then he goes on and asks you a question. Did counsel tell you at that time that the date of this email is actually five hours or six hours earlier?
A. No.

THE COURT: But you had no recollection of this email, right? Isn't that what you said in your deposition?

Did you get a lot of "But, seriously, folks" emails from Mr. Kury. Sort of the way he begins his things, like a stand-up comic?

THE WITNESS: No, I did not get a lot of them.

THE COURT: No. Did you get more than one ever that you can recall?

THE WITNESS: Well, I probably did, your Honor.

THE COURT: Seriously? We'll hear from Mr. Kury whether he wrote them in that way.

But go back to the prior page, if you would, Mr. Boies, or whoever is manning this thing.

"Do you recall receiving this email from Mr. Kury?
"A. No."

So, was that accurate or inaccurate?

THE WITNESS: It was my understanding at the time -- your Honor, at the time what was confusing me --

THE COURT: Was the date.

THE WITNESS: -- was the date and the time because I don't recall after midnight having an email come in from Mr. Kury asking this question. I do recall on the night of the 23rd discussing with Mr. Kury the fact that he got the letter from Mr. Deyo, and his recollection -- Mr. Kury's recollection of what happened on January 9, what didn't happen on January 9, us engaging in a lot of dialogue as to what was the meaning of this letter, what is J&J up to, etc., etc., but all that occurred before midnight, well before midnight.

THE COURT: So that is what threw you, was the date?

THE WITNESS: Yes.

THE COURT: Sometimes having an explanation for everything doesn't help credibility. As the fact-finder, I'll just sort of share that.

But go ahead, next question.

Q. Let me ask you to turn next to Kury Exhibit 2. This is the Johnson & Johnson/Guidant confidential agreement dated August 4, 2004. I am going with some trepidation to go back to the structure of this document because I think it is important that the record be clear.

First, is there anywhere in this document that limits what information can be given to anyone other than that the information will be used solely for the purpose of exploring possible negotiated business arrangements and not for any other business or competitive purpose; and, second, that the information will be kept confidential in accordance with the terms of this agreement?

A. That is certainly the limitations in this agreement. As I said, there are other confidentiality provisions if you get a third-party subpoena, etc., but the operative rule as to how the recipient of the information must deal with the information is in the language you recited.

Q. We have talked quite a bit about whether the person who makes the takeover proposal, whether, for example, Boston Scientific could on its own give Abbott information as opposed to Guidant giving information. I am not asking about that issue again now. What I am focusing on is the way representative is used here.

And the very first very long or, I guess, it's the second sentence, the very long sentence, second sentence it says, "In connection therewith, you may receive certain information from us or our representatives, and we may receive certain information from you or your representatives, and that information is Information."

Is that a fair summary of what that first paragraph is doing?

A. Yes.

Q. Is representative there being used to define what the confidential information is; that is, it is the confidential information furnished by one party or its representatives to another party or its representatives. Is that correct?

A. Yes.

Q. Is there anything in this confidentiality agreement -- leaving the merger agreement aside, is there anything in this confidentiality agreement that limits Guidant or anyone else as to whom it may give confidential information?

A. This agreement doesn't limit Guidant's ability to give confidential information to other people.

MR. BOIES: That's all I have, your Honor.

THE COURT: Anything else?

MR. COFFEY: No, your Honor, thank you.

THE COURT: I have a couple of questions with respect to the merger agreement.

Go back to 4.02. Do you have it in front of you?

THE WITNESS: Yes, your Honor.

THE COURT: So 4.02(A) defines representatives as "subsidiaries, directors, officers or employees or any investment banker, financial advisor, attorney, accountant or other advisor, agent or representative (collectively Representatives) retained by it or any of its subsidiaries."

I just want to make sure that I understand. In December of 2005, you considered Abbott to be what in this litany?

THE WITNESS: A representative.

THE COURT: Lower case R, representative?

THE WITNESS: Yes, your Honor.

THE COURT: So they weren't an investment banker?

THE WITNESS: No, your Honor.

THE COURT: Or financial advisor?

THE WITNESS: No, your Honor.

THE COURT: Or an attorney?

THE WITNESS: No.

THE COURT: Or accountant or other advisor?

THE WITNESS: It's possible they were giving advice in some relationship with Boston Scientific, I don't know. That would be speculation, but the reliance was on small R, representative.

THE COURT: All right. Your understanding of that term you've said was that that meant anybody on the side of the deal of the party at issue?

THE WITNESS: Anyone working with Guidant, yes.

THE COURT: Anyone working with Guidant.

Have you ever had an agreement before -- I mean, you've done a lot of merger agreements, I assume. You've been involved in a lot of them, correct?

THE WITNESS: Yes, sir.

THE COURT: So in my experience, lawyers who deal lawyers often take the last deal, dust it off and tweak it here and there, but they cut-and-paste and do all of that.

So do you know where this provision came from, this 4.02, was it the vestige of some other agreement.

THE WITNESS: It was draft prepared by Cravath, your Honor; not by Skadden.

THE COURT: Do you know whether it had been used in some other deal before?

THE WITNESS: I don't know, your Honor.

THE COURT: Had you ever had a deal in which representative was given the definition that you are positing here in court?

THE WITNESS: I don't specifically recall. I'm sure I had worked on agreements with definitions of representatives like this or very, very similar.

THE COURT: Well, have you had deals where representative is defined with the word representative? That struck me as odd, but I don't do as many deals as you. Is it common to define a term with reference to the very term itself?

THE WITNESS: It's not ideal drafting, your Honor, but it does occur.

THE COURT: All right. So does it occur in deals that you have been involved in?

THE WITNESS: I believe it probably has, your Honor. I can't specifically cite them to you as I sit here.

THE COURT: Are you aware of any transaction that you've been involved in, or any other transaction that you're aware of, where representative was defined as you have defined it here, as anyone involved in the deal?

THE WITNESS: Yes. In the context, your Honor, of most no-solicitation clauses, the buyer is getting what it wants to get, when it says the seller and its representatives can't solicit, it wants representatives to be read as broadly as possible.

THE COURT: So you are saying this is a standard usage of the term representative in a non-solicitation clause. Is that what you're saying?

THE WITNESS: I'm saying it's the clear intent of the purchaser to have representative read broadly so that it gets what it wants; that is to say, that the seller and anyone working with it cannot solicit the higher proposal. If the draftsman was just providing that the seller and some small category of professionals cannot solicit, the draftsman would not be achieving what the buyer wants. The buyer wants the seller to be totally passive and wants everyone working with the seller to be totally passive.

THE COURT: Why is it necessary to list financial bankers, financial advisors, attorneys and accountants if the broad definition of representative as you've defined it is sufficient?

THE WITNESS: It's the pattern in these agreements, your Honor.

THE COURT: Well, generally agreements are construed as though the words have actual meaning?

THE WITNESS: Yes, your Honor. I think the meaning of the word representative here is as I have construed it.

THE COURT: So who did Abbott represent or is representative divorced from the root of the term?

THE WITNESS: Abbott was a representative in the sense it was working with --

THE COURT: They were representing Guidant?

THE WITNESS: No, your Honor. That is not required.

THE COURT: Well, why is it not required? Well, representative generally denotes some sort of representation. Would you agree with that, or no?

THE WITNESS: Well, not necessarily, your Honor. If you look at the litany of people, an accountant, an independent public accountant does not consider itself a representative of its client.

An investment banker, their engagement letters say they're independent contractors; not necessarily a representative. The investment banker is providing underwriting service. They're clearly not your representative. They're someone across the table buying your securities.

So I think within this litany of categories, there are professionals who do not consider themselves representing the company in this sense, but they are working with that party and the intent of a purchaser is that people working with you can't solicit either.

THE COURT: Well, it says agent or representative, and is actually is separated by a comma. You're not suggesting that Abbott was the agent of Guidant in this case?

THE WITNESS: No, your Honor.

THE COURT: So, again, in your draft response of January 23 or 24, you didn't think it would be appropriate to explain the actual reason that this information was provided to Abbott; that they were a representative as defined in the merger agreement?

THE WITNESS: I did not so explain, your Honor.

THE COURT: Did you think of explaining that, and decided against it, or you don't have any recollection?

THE WITNESS: I don't have a specific recollection, as I've said before, your Honor. The fundamental reaction to that letter was one of disbelief and surprise and shock.

THE COURT: When you got an email after you sent a draft to Mr. Kury saying, "But, seriously, folks" -- I want to quote it right. "But, seriously, folks, what is the technical analysis of whether A is a bidder?"

At your deposition, you didn't recall this email at all. Do you recall it now?

THE WITNESS: Yes, your Honor.

THE COURT: You do. And what happened after you got this email, what did you do?

THE WITNESS: I spoke to Bernie Kury is my memory.

THE COURT: What did you say to him, and what did he say to you to the best of your recollection?

THE WITNESS: Said to him, Abbott did everything that would qualify it as the maker of a takeover proposal and could be so considered, but we didn't give Johnson & Johnson formal notice of that fact. We treated Abbott as a representative of Boston Scientific.

THE COURT: What did he say when you explained that to him?

THE WITNESS: I believe I understand he was -- I believe he was satisfied with the conversation, your Honor. I don't recall his exact words.

THE COURT: Had he been confused by your draft letter with respect to its reference to joint bidder?

THE WITNESS: I don't know if he was confused, your Honor. I do remember earlier in December talking to him about a divestiture buyer as I said could end up being someone also making a takeover proposal.

THE COURT: When you received this email, did you infer from its language that he must be confused; he thinks that we are relying on the joint bidder argument which we're not?

THE WITNESS: That's what it suggests to me, but I --

THE COURT: You don't recall thinking that at the time?

THE WITNESS: I don't specifically recall, but that's what it suggests to me. I probably did think that at the time because that's what it suggests to me.

THE COURT: I don't want to know what you probably did. I want to know what you remember. So do you have any recollection?

THE WITNESS: Well, I remember clearly thinking he had a question, and I spoke to him about his question.

THE COURT: Did you have any discussion with him about we're actually relying on the language in the merger agreement specifically the term representative? Did you have a conversation like that, or in substance like that?

THE WITNESS: Yes, I believe I did, your Honor, and that's why the response had the reference to financial sources who we understood to be representatives of Boston Scientific as well.

THE COURT: Was there any discussion about altering or modifying the letter you drafted to make clear what was the basis for your providing the information?

THE WITNESS: Not that I recall, your Honor.

THE COURT: So instead the agreement that one would infer confused Mr. Kury was sent to Johnson & Johnson unchanged?

THE WITNESS: It was sent unchanged.

THE COURT: All right. Anybody have any questions in light of my questions?

MR. COFFEY: No. Thank you, your Honor.

THE COURT: Mr. Boies?

MR. BOIES: Just one, your Honor.

THE COURT: Sure.

REDIRECT EXAMINATION CONTINUED

BY MR. BOIES:

Q. The evening of January 23, this was how many days after the announcement?

A. On January 17, I believe Boston Scientific gave us its final proposal at $80 a share.

THE COURT: Is that the announcement you're referring to?

MR. BOIES: Yes.

Q. And you were going to have a board meeting the next day, correct?

A. On the 23rd. We were going to have a board meeting on the 24th, yes.

Q. Were you interested in being sure that you got some response out that evening of the 23rd?

A. I thought it appropriate, yes.

MR. BOIES: No further questions, your Honor.

THE COURT: Did you think it was important to have a response that actually reflected what your rationale for providing the information was?

THE WITNESS: As I said, your Honor, the overwhelming focus of the discussion was the shock and surprise that at this point for the first time Mr. Deyo's making a suggestion that we somehow breached the merger agreement.

THE COURT: So you took this as a threat of litigation?

THE WITNESS: We were trying to figure out what it was, your Honor. It was very confusing. As I think I testified, at the board meeting someone in the room suggested maybe they're going to ask for expenses or something and are rattling the cage.

THE COURT: Right. So didn't that suggest to you that you ought to articulate what the actual reason for providing the information was?

THE WITNESS: Not necessarily, your Honor, because the position they were taking struck us as bizarre, not in good faith given the course of conduct that had occurred since January 9.

THE COURT: So what would be the downside of explaining the actual reason that you relied upon with the language from the agreement on which you based that rationale?

THE WITNESS: It wasn't clear, your Honor, that we were dealing with a party operating in good faith at that point.

THE COURT: So that was the reason for your not specifying the actual rationale?

THE WITNESS: That was part of the atmosphere of the receipt and the response, your Honor.

THE COURT: I'm asking if that was part of the reason. Is that part of the reason that you chose not to do it or you're speculating?

THE WITNESS: I'd be speculating, your Honor. The email came in and within a couple of hours a response was prepared.

THE COURT: Mr. Coffey, maybe you can help me, there were handwritten notes on a PowerPoint dec.

MR. COFFEY: Mulaney 7. Oh, on the dec. Sorry.

THE COURT: On the dec.

MR. COFFEY: That's Mulaney 27, Judge. In the binder. I believe you are looking for page 4.

THE COURT: Do you have that in front of you there, Mr. Mulaney?

THE WITNESS: Yes, Judge.

THE COURT: You recall discussing the January 23 letter with the board the next day, right?

THE WITNESS: Yes.

THE COURT: Did you discuss with them the fact that you drafted a response, and that Mr. Kury in fact had sent the response?

THE WITNESS: Yes, I believe we told the board that. Yes.

THE COURT: Did you articulate for the board's benefit what the actual rationale was for providing the information to Abbott in the first place?

THE WITNESS: I believe I did, your Honor.

THE COURT: What do you remember saying?

THE WITNESS: I remember saying we treated Abbott as a representative of Boston Scientific. We treated other financing sources, such as Merrill Lynch and Bank of America, as representatives of Boston Scientific. I remember saying the participation of Abbott in the transaction is an integral part of it, and it provides a significant amount of critical and necessary financing for Boston Scientific to make the proposal that it's making, as well as solving the antitrust problem so that the board of Guidant would be in a position to conclude that the Boston Scientific offer would close given both financial and regulatory matters.

THE COURT: Any discussion about joint bidder which had been the rhetorical point made in your letter?

THE WITNESS: There was discussion, your Honor, yes, and there was express explication of Abbott's role in the transaction because Abbott was playing a critical role, and if they failed to perform, we would, as I say, not have a closing. We may have a lawsuit, but we would not have a closing.

So Abbott's involvement and its providing financing by buying assets from Guidant making a loan to Boston Scientific, and in buying equity in Boston Scientific was a critical set of components for the board of directors to appreciate and understand to make the ultimate business judgment whether they should terminate the Johnson & Johnson agreement, pay it a breakup fee in excess of $7 million and sign an agreement with Boston Scientific.

THE COURT: Anything else?

MR. COFFEY: Your Honor, may I just?

THE COURT: You can ask a question. Look, if I ask questions, I think I often open doors to things that the parties may not have addressed in their directs or crosses or redirects, whatever. I think it is only fair that I let people follow-up.

MR. COFFEY: Right, and with your Honor's permission, we'll walk through that door.

RECROSS EXAMINATION

BY MR. COFFEY:

Q. Mr. Mulaney, if you will turn to your deposition page 262.

Marco, if you could pull up the beginning of line 22 and the first line of 263. This is after Mulaney 27 has been marked and there is some back and forth.

THE COURT: 262?

MR. COFFEY: Yes, your Honor, 262/line 22.

Q. Mr. Mulaney, I would like you follow along to make sure I read this correctly.

THE COURT: What line?

MR. COFFEY: Line 22, your Honor -- actually, let me start at line 3. I want to make sure we have all the context. I want to be fair.

Q. Beginning on line 3, read along with me to make sure I get this right.

"Q. Apart from discussing the issues with respect to J&J making additional bids and waiting 14 days which you've relayed to us, do you recall providing any substantive response to the suggestion in J&J's letter that the no-solicitation clause had been violated in your discussions with the board on that day?"

There is an objection.

You answer:

"A. I believe, yes, there was -- I recall a discussion of -- indicating to the board that the basis on which information was provided we were comfortable was permitted by the merger agreement with Johnson & Johnson and that, as I said, we took it as confirmatory that Johnson & Johnson had treated that Boston Scientific offer with the Abbott agreement an integral part of it, as something to be economically responded to rather than legally attacked.

"Q. Do you recall what -- when you said to them that it was permitted by the merger agreement, what specific rationale, if any, you provided to them?

"A. I don't recall."

Did I read that correctly, sir?

A. Yes, you did.

MR. COFFEY: That's all I have, your Honor.

THE COURT: Mr. Boies, anything?

MR. BOIES: No, your Honor.

THE COURT: You can step down, Mr. Mulaney.

(Witness excused)

THE COURT: Some people may need a restroom break. Why don't we take a short break, and we will start with the next witness.

(Recess)

THE COURT: Kury.

BERNARD KURY,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOIES:

Q. Thank you, your Honor.

Good afternoon, Mr. Kury.

A. Good afternoon.

Q. I hand you Defendant's Exhibit 166, and we also have placed in the witness box two binders of exhibits that represent the exhibits referenced in your affidavit that has been marked as Defendant's Exhibit 166. Do you recognize Defendant's Exhibit 166?

A. Yes.

Q. What is it?

A. Are you asking me about this or this on the screen?

THE COURT: Just the hard copy that is in your hand, 166.

A. It is my trial affidavit, yes.

THE COURT: Right.

Q. After having submitted it, did you have a chance to review it?

A. Yes.

Q. And do you have any changes or modifications that you feel you need to make?
A. No.
MR. BOIES: Your Honor, I would offer Defendant's 166 and the related exhibits. And I pass the witness.
THE COURT: Thanks very much.
(Defendant's Exhibits 166 received in evidence)
MR. WEINBERGER: Your Honor, we are not going to use the exhibits that he has to his affidavit. We are going to use these two volumes that he has. I would like to bring the two up to you and maybe I will remove the two and put them on the side.
THE COURT: Let's do that.
CROSS-EXAMINATION
BY MR. WEINBERGER:
MR. WEINBERGER: May I proceed?
THE COURT: You may.
MR. WEINBERGER: Thank you, your Honor.
BY MR. WEINBERGER:
Q. Good afternoon, Mr. Kury. You were the chief legal officer of Guidant at the time of the transactions we're talking about here, were you not?
A. I was.
Q. And you were an experienced corporate attorney, were you not?

A. I was.
Q. And part of your experience included mergers and acquisitions. Am I correct?
A. Yes.
Q. As to the J&J/Guidant contract, am I correct that you were responsible for overseeing Guidant's participation and possible merger, selecting outside counsel and overseeing their work?
A. Yes.
Q. And the same is true for the merger with Boston Scientific?
A. Yes.
Q. So, in your role as overseer, you had the responsibility to know what was in the merger agreement, and you had to make sure that Guidant was in compliance. Isn't that correct?
A. Generally, yes. Obviously, I was working closely with outside counsel, but yes.
Q. You had the responsibility as chief legal officer of Guidant, did you not?
A. Yes.
Q. And you familiarized yourself with the requirements of that agreement, didn't you?
A. Yes. Again, at a general level. Not necessarily every level of detail, but yes.
Q. You familiarized yourself in particular with the provisions of section 4.02, didn't you?
A. I certainly read it on several occasions, yes.

Q. And that wasn't the first time you'd ever seen a provision like that, was it?
A. I'd seen -- I've certainly seen those kind of provisions before. I don't know that I at the time compared them with predecessors or models, but yes, I'm generally familiar with them.
Q. They're fairly common in public company merger agreements?
A. Yes.
Q. The original merger agreement was entered into by Guidant and J&J on December 15, 2004, was it not?
A. So far as I can recall, yes.
Q. If you could look at Kury Exhibit 8 in the binder.
A. That is the merger agreement of December 15, sir?
Q. Yes.
A. Yes, I see it.
Q. It is it your recollection that that merger agreement provided for a price of $76 per share?
A. I believe that is correct, sir.
Q. It had a provision Section 4.02 that is the same one that is in the agreement that's before this Court now. Isn't that correct?
A. That's my recollection.
Q. You understood, did you not, that Guidant's ability to consider competing offers under that section ended when the Guidant shareholders approved that transaction on April 27,

2005. Am I correct?
A. You are correct.
Q. Then there were a series of events relating to some investigations that led J&J to advise Guidant that J&J believed it was no longer obligated to close. Do you recall that?
A. Yes, I do.
Q. And J&J wanted to renegotiate the deal. Do you recall that?
A. Yes.
Q. Do you recall that Guidant disagreed and believed that J&J was obligated to close?
A. That is correct.
Q. Do you recall then on October 17, 2005 -- Mr. Deyo is your counterpart at J&J? Mr. Deyo was your counterpart?
A. Yes.
Q. Do you recall that on October 17, 2005 he called you and told you that J&J was going to announce that it was considering its alternatives under the original merger agreement in light of recalls and other problems. Do you recall that?
A. I recall that. I don't recall the precise date.

(Continued on next page)

Q. Okay. Well, it's in your affidavit at paragraph 32?
A. It is. It happened around that time. I don't remember precisely.
Q. And is it correct that on November 7th, 2005, Guidant filed a lawsuit in this court alleging that J&J was required to complete the acquisition under the original merger agreement?
A. Yes.
Q. And ultimately, one week later, is it correct that the merger agreement that we're here about was signed?
A. I think that chronology is right, yeah.
Q. And there was a new price of $63 a share; is that correct?
A. Yes.
Q. And section 4.02 in that agreement was the same; it was carried over from the prior agreement? It's the same language, wasn't it?
A. Yes.
Q. And Guidant wasn't very happy about that price, was it?
A. No, we would have preferred another price.
Q. And you knew that shareholder approval was required for this new deal, didn't you?
A. Yes.
Q. And you knew that Guidant could, once again, consider qualifying and competing offers under section 4.02, didn't you?
A. Yes, I did.
Q. But as of October 27th, Guidant was still under contract to

J&J, wasn't it?
A. I don't remember the exact date when we terminated.
Q. Well, you can go and look at your affidavit, but just to refresh your recollection, I think we've already established that the lawsuit you brought was on November 7th. The new agreement was signed on November 15th?
A. Yes.
Q. So as of October 27th, you were still under the original agreement with Johnson & Johnson; is that right?
A. I think that's right, that we hadn't --
Q. Essentially?
A. Yes, hadn't replaced the agreement, yes.
Q. Again, at that point, your ability to consider other offers was foreclosed; isn't that correct?
A. I think that's right because we had stock approval.
Q. You're aware that there's been evidence in this case that on October 27th, nine days after J&J's public announcement that it was considering its alternatives, Guidant's investment bankers visited Boston Scientific CFO, Larry Best, and discussed the possibility of Boston pursuing a transaction with Guidant? You're aware of that?
A. No.
Q. You were not aware of that at the time?
A. No.
THE COURT: I think the question was, are you aware

that there's been evidence in this case.

MR. WEINBERGER: Okay. Thank you, your Honor.

BY MR. WEINBERGER:

Q. Were you aware of that at that time?

A. No.

Q. Now, in any event, at the time Guidant agreed to the new price and signed the new agreement, Guidant was aware that Boston Scientific was interested in acquiring it, wasn't it?

A. When? What was the date, sir?

Q. On November 15th, when Guidant signed the new agreement with Johnson & Johnson, you were aware that Boston Scientific was interested in acquiring Guidant, weren't you?

A. Well, there was that incident, I think it was around November 1, when there was some discussion of whether or not Pete Nicholas could meet with Jim Cornelius.

Q. There was a call, wasn't there, from the chairman of --

A. That's what I recall, there was a call inquiring about Jim's availability to have a discussion.

Q. And the discussion was about a possible deal by Boston Scientific for Guidant; isn't that right?

A. I don't recall how specifically it was, but it was something that I think was possibly contemplated, yes.

Q. And when that offer came in on December 5th, 2005, it was not a surprise to Guidant, was it?

A. The offer?

THE COURT: The offer?
Q. No. When the tentative proposal was made by Boston Scientific on December 5th --
A. Oh, December 5.
Q. -- December 5, 2005, that was not a surprise to Guidant, was it?
A. It was a surprise to me.
Q. Could you --
A. I don't know if there is someone else who may have been not surprised or surprised, but I was surprised.
Q. Could we show the witness Kury Exhibit 10, please. You could either look on the screen or you can turn to it in the first volume.
A. Okay.
Q. So, Mr. Kury, just so you know how these are organized, these are in alphabetical order by witness name. So if you look under Kury 10 in the first binder --
A. I see it.
Q. And this is an e-mail that you received a copy of, isn't it?
A. I did receive it.
Q. And Vicki Allen, she's the assistant to Mr. Cornelius?
A. Yes.
Q. And he was sending this around to a bunch of people --
A. Yes.

Q. -- at Guidant; is that right?
A. Yes.
Q. And he was telling people that the board was going to meet to review outside legal and financial advisers and the "surprise" Boston Scientific letter and proposed transaction?
A. Yes.
Q. Do you see that?
A. Yes.
Q. And when you saw that, did you have any understanding of why the word surprise was in quotes?
A. No.

THE COURT: Do you recall seeing this e-mail?

THE WITNESS: Yes.

THE COURT: Do you recall seeing the term surprise in quotes?

THE WITNESS: I saw it.

THE COURT: And do you recall what your thought was or thoughts were when you saw that in quotes?

THE WITNESS: Not really. I don't think I asked him about it.

THE COURT: Well, did you think anything from it? Surprise, in quotes, is suggesting it's being ironic, isn't it?

THE WITNESS: The only way I would have been concerned would be if I thought that Jim might have been talking to Boston in violation of the agreement.

THE COURT: Well, did you have such concerns?

THE WITNESS: No.

THE COURT: Did you construe surprise in quotations to be ironic?

THE WITNESS: There are other ways that Jim could have anticipated or thought that it might be possible that they would make a bid. He'd known Mr. Nicholas for many years, and there was the telephone call from early November, where Mr. Nicholas had expressed some interest in meeting. So I don't know why he -- if he meant to indicate it was not completely a surprise. I don't know exactly what his reasoning process was, but it did not occur to me that he was out violating the agreement.

THE COURT: Do you recall what you thought when you saw the term surprise in quotes?

THE WITNESS: No.

THE COURT: No, okay. Next question.

BY MR. WEINBERGER:

Q. Now, prior to signing the original merger agreement between Johnson & Johnson and Guidant, you signed a confidentiality agreement with Johnson & Johnson on behalf of Guidant; did you not?

A. Yes.

Q. If you look in your binder at Exhibit 2, Kury Exhibit 2, I'd like you to just identify --

A. Is this coming up on the screen?
Q. It will come up on the screen, but you're only going to see the first page.
A. Yes.
Q. I'd like you to identify your signature on that agreement and confirm that you signed it.
A. What exhibit number is it?
THE COURT: Kury Exhibit 2. They're alphabetical; so after John, Kury picks up.
A. I see my initials.
THE COURT: On the first page?
THE WITNESS: I see initials on every page, and that's my signature on Page 5, yes.
BY MR. WEINBERGER:
Q. I'm happy to go back and show you section 4.02 of the merger agreements, but maybe without that, you can confirm to me that you were aware of the requirement in that agreement that any disclosure to a second bidder, a subsequent offeror, had to be pursuant to a confidentiality agreement not less restrictive to such person than the confidentiality provisions of this agreement, of Kury Exhibit 2; can you confirm that to me?
A. Yes.
Q. And when you signed the merger agreement, you signed the merger agreement on behalf of -- did you sign the merger

agreement on behalf of Guidant?
A. I don't specifically recall, but I probably did.
Q. Okay. And you understand what that meant, that provision that said that any disclosure to a subsequent offeror had to be pursuant to a confidentiality agreement not less restrictive to such person than the confidentiality provisions of the J&J confidentiality agreement; did you not?
A. I was aware of the language. I don't know that I thought long and hard about exactly what that would mean in application to a future agreement.
Q. Well, you ultimately -- come to this minute -- you ultimately signed the agreement between Boston Scientific and Guidant, didn't you?
A. Yes, I did.
Q. And when you signed that agreement, did you understand what the requirement was in the merger agreement as to what the Boston Scientific/Guidant agreement had to provide for?
A. I understood that the Boston/Guidant agreement would need to be consistent with the requirements of the Johnson & Johnson contract.
Q. Well, when you say consistent, the language is not less restrictive to such persons than the confidentiality provisions of the --
A. I think that's the substance of being consistent.
Q. So your understanding was it had to be consistent?

A. Or whatever, yes. That it was going to be compliant, it had observed the legal guidelines put in the Johnson & Johnson agreement.
Q. Now, before signing -- first of all, could you identify Kury Exhibit 13 as the Boston Scientific/Guidant confidentiality agreement that you signed?
A. Well, there's no signature on my copy here, but the copy in my document does not have the signature on it. I have no reason to doubt that it's not what you're telling me.
Q. I think there's multiple signature pages. If you look at the page that's Bates number 134122, on the bottom right-hand side?
A. Oh, yes. Excuse me. It's over on this page, yes. So that, I signed it, yes.
Q. Now, before you signed this agreement, you sent a letter to Mr. Deyo telling him that Guidant would sign a confidentiality agreement "not less restrictive to Boston Scientific than the confidentiality provisions of the confidentiality agreement as defined in the merger agreement."
If you look at Kury Exhibit 12, I think you will see that letter. I'd just like you to confirm to me that that is the letter that you sent to Mr. Deyo?
A. Is it coming up on the screen?
Q. Kury Exhibit 12.
A. Yes, I sent that letter.

Q. Okay. And that's the language that's used in the merger agreement, isn't it, pretty much?
A. Pretty much, yes.
Q. And both the J&J -- and you're free to look and compare Kury Exhibit 2 and Kury Exhibit 12, but both of those agreements contain definitions of the term "representatives"; do they not?
A. Yes, they do.
Q. But the Boston agreement adds financing sources and as to Boston Scientific "third parties reasonably satisfactory to us that are identified as potential purchasers of assets to be divested"; do you recall that?
A. I'm not sure what you were just saying there; so would you repeat that?
Q. Okay. If you would look at Kury Exhibit 13 --
A. Is this the letter to Deyo, or is this something different?
Q. No, Exhibit 13 is the Boston Scientific and Guidant confidential agreement.
A. And what page?
Q. If you look on the first page of the agreement, it's the second page of the document, Bates No. 4118 are the last four digits of the Bates number.
THE COURT: The first page of the letter, the second page of the exhibit; so, yes, in there.
A. I'm still not finding this.

Q. We can put it up?
A. Please do.
Q. Do you see it? Have you got it now, Mr. Kury?
A. Well, I have the first paragraph of the confi agreement. What language are you looking at, sir?
Q. Do you see, first of all, that in the definition of representatives, in the second sentence it includes financing sources?
A. Yes, I see that.
Q. Okay. Do you see that following that sentence, there's another sentence that says: With respect to you, the term representatives shall also include third parties reasonably satisfactory to us that are identified to us as potential purchasers of assets to be divested and who execute a confidentiality agreement reasonably --
A. Yes, I see that.
Q. Do you see that language?
A. Yes, I do.
Q. Neither of those two things are in the J&J confidentiality agreement; is that right?
A. The words are not there.

THE COURT: That whole sentence is not there.

A. The words are not there.
Q. So the words "financing sources" are not in the J&J agreement and the sentence that I read is not in the

J&J/Guidant --
A. That is correct, sir.
Q. And you were involved in the drafting process for this document, weren't you?
A. I reviewed drafts. I didn't participate in the actual drafting.
Q. Okay.
A. But I think I sent copies, and I would comment on and raise questions if I had them.
Q. But drafts were sent to you or copies?
A. Yes, I received drafts.
Q. If you look at Mulaney Exhibit 12, and I apologize you'll have to go to the second binder, unless you want to look on the screen. Mulaney Exhibit 12 is a draft of that document that was sent to you by Alison Rhoten of Skadden; is that right?
A. Yes. I assume it was -- I take your word for that. I don't quite see it on the screen here.
Q. If you go to the e-mail, Marco. Do you see that it was sent to you by Alison Rhoten?
A. All right.
Q. Okay. And you might be able to do this better by actually looking at the document. I would like you to confirm to me that this draft was prepared by black lining the J&J guideline confidentiality agreement?
A. Well, they say her outline -- or the e-mail says the black

line is marked against the J&J confi.
Q. And if you go to the third page of the document, the one that has the Bates No. 346603, can you confirm to me that it was Skadden, when they generated this draft, that added the term "financing sources" to the definition of "representatives"?
A. Well, it's in a draft submitted to me by Skadden. I don't know whether they did that on their own initiative or someone else's initiative.
Q. Well, they're sending you a black line of the J&J agreement with some changes, and one of the changes was to add "financing sources," right?
A. Yes, that's right. Yes.
Q. Now, you also were advised of the fact that Boston Scientific's lawyers wanted to add to the term "representatives" with whom they can share information, third parties reasonably acceptable to Guidant, who Boston identified as potential purchasers of the assets to be divested. You were aware of that, weren't you?
A. Yes, I was.
Q. And if you turn to Duwe Exhibit 1, that would be back in the first binder.
A. I now have it.
Q. Do you have it?
A. Yes, I do.

Q. That's an e-mail that Mr. Duwe sent to you?
A. Yes, it is.
Q. On December 7th, 2005?
A. Yes.
Q. And he's telling you that Boston Scientific would like to add to the term "representatives" with whom they can share information, "third parties reasonably acceptable to Guidant who BSX" -- that's Boston Scientific, right?
A. Yes.
Q. -- "identifies as potential purchasers to the assets to be divested;" do you see that?
A. Yes, yes.
Q. And after you signed -- and that was added, was it not? That's in Kury Exhibit 13, which was the final agreement?
A. Are you asking me, it was after and what's the purpose?
Q. I'm saying the term -- what Shearman and Sterling requested on behalf of Boston Scientific, adding to the term "representatives," third parties, et cetera, et cetera, that was incorporated in the Boston Scientific confidentiality agreement?
A. Oh, yes, that's true.
Q. And after you signed the agreement, you wrote to Mr. Deyo and you told him that you had executed a confidentiality agreement consistent with our obligations under the J&J merger agreement; did you not?

A. I did.
Q. And will you confirm to me, please, that Kury Exhibit 14 is that letter?
A. Coming up? Okay. Yes. That is the letter.
Q. Now, in your affidavit, your trial affidavit, in paragraph 58, you state as follows: When Skadden provided me the BG confidentiality agreement -- that's the Boston Scientific/Guidant --
A. Yes.
Q. Just if you'll let me finish the question.
A. I see.
Q. That's the Boston Scientific/Guidant confidentiality agreement?
A. Yes, I see that.
Q. "When Skadden provided me the BG confidentiality agreement to sign on behalf of Guidant, I understood that Skadden considered it appropriate and consistent with the merger agreement for me to do so. Skadden never suggested otherwise." Do you recall that?
A. Yes, I do.
Q. But you have no recollection of a specific discussion with Skadden about this issue, do you?
A. I don't think that's correct.
Q. You said you don't think that's correct?
A. That I never had any discussions about the --

Q. No. I'm asking you whether you have any recollection of a specific conversation about this issue -- "this issue" being the addition of this, this provision, to the Boston Scientific Guidant confidentiality agreement?
A. I think, at some point, I did raise a question about that because I was just asking whether -- I think I would have asked, is this language necessary, appropriate or otherwise any kind of a problem.
Q. Are you saying that, at some point before you signed this agreement, you had that conversation?
A. I think that's correct, yes.
THE COURT: With whom?
THE WITNESS: I don't know whether it would have been -- it would have been either with Chip or it would have been with Brian Duwe. I don't remember.
THE COURT: Do you remember anything more specific about this conversation?
THE WITNESS: My understanding -- I can't relate it to a specific conversation, but my general understanding was that Skadden thought that while the words were being added to the agreement, it did not change their understanding of what the scope of the agreement was, and it was a matter of making clear that that was how they interpreted the agreement. It was not that they had any intention or expectation that by putting these words in, they were in any way modifying the requirements

of the Johnson & Johnson agreement.
BY MR. WEINBERGER:
Q. But you can't tell me about a specific conversation, a specific person you had it with, a specific time you had it --
A. No.
Q. Let me just finish the question, Mr. Kury. In which you specifically discussed this issue of whether adding these terms to the Boston Scientific/Guidant confidentiality agreement was consistent with the merger agreement; am I correct?
A. I cannot identify a specific conversation with a specific person, but my understanding was clear that they were comfortable with this arrangement and that they did not think they were -- or we would be violating the Johnson & Johnson agreement by agreeing to this.
Q. And you can't tell me the rationale either, can you?
A. The rationale, I think, was that they would have interpreted that language that way anyway; that the original Johnson & Johnson agreement, without the addition of that, would have been properly interpreted to include those categories of parties.
Q. That's the rationale you remember them giving you?
A. I believe that's what it was, yes.
Q. Now, you also in your -- isn't it a fact that the only thing they said that you can remember is that somebody said to you, at some point, that these are okay? You asked if they

were okay and you were assured they were?
A. I think it was a bit more than that. I think they were telling me not just it's okay, but that they didn't think it was changing the substance of what the Johnson & Johnson agreement was. It was more a matter of clarifying as between them and Shearman and Sterling that both parties had the same understanding of the provision.
Q. Could you -- you have -- in the back of the second binder there's a tab with your deposition transcript.
A. The back of the second one?
Q. The back of the second binder, you should see a tab. If you can't find it, just let me know, and I can help you with it.
A. Okay. I think I have it here. Did you want to point me to something, sir?
Q. Yes. I'd like you to turn to Page 255.
A. Is that coming on the screen here? Okay. I see 255, yes.
Q. Okay? And I'm going to ask you -- you remember I took your deposition twice, unfortunately?
A. Yes, I do remember that.
Q. Okay. So I'm going to ask you if, on the second occasion I took your deposition, I asked you the following question and you gave me the following answer.

THE COURT: What page?

MR. WEINBERGER: 255, Line 9.

A. Line 9? Okay.
Q. Okay?
"Q. And I'd like to know whether Guidant, whether you or anyone else at Guidant received any advice from counsel that the agreement that Guidant signed with Boston Scientific was no less restrictive to Boston Scientific than the confidentiality provisions of the J&J/Guidant confidentiality order" -- it's a misstatement -- "and I have -- if you need to see the confidentiality agreement, I can show it to you.
"A. The same answer. Again, I do not -- I cannot say a specific time, a specific place that I had a conversation where I said, is this word all right, is that word all right, but it came to me in a form with additions. I am confident I said to somebody, there are some differences, are these all right, and I was assured that they were."
Do you remember giving me that testimony?
A. Well, I see it there. So I believe I said it.
Q. Well, you also stated in your affidavit, you point to Duwe Exhibit 1 as containing advice from Skadden Arps with respect to your signing of this Boston Scientific/Guidant confidentiality agreement. That's in paragraph 58 if you'd like to look at it.
A. Yes.
Q. So I'd like you to look at Mr. Duwe's e-mail.
A. Yes, I see it.

Q. And --

THE COURT: What exhibit, Duwe 1?

MR. WEINBERGER: Duwe Exhibit 1.

Q. So first of all, Mr. Duwe is saying that Shearman and Sterling, he says, "In addition, they would like to add to the term with whom they can share information, third parties reasonably acceptable to Guidant," et cetera. I won't read the whole thing.

It was clear to you from reading this, was it not, that Mr. Duwe is telling you that under the J&J confidentiality agreement information can only be shared with representatives, isn't he?

A. I don't know that he's saying solely. He seems to be saying that they would like to add to the term representatives.

Q. Well, you say -- no, he's not just saying add to the term representatives. He's saying, add to the term representatives with whom they can share information. Isn't that what he's saying?

A. Well, the words are in there, yes.

Q. So he's advising you that, under the J&J confidentiality agreement, that the sharing of information is restricted to J&J and its representatives, isn't he?

A. To J&J and its representatives?

Q. Yes, sir, under the J&J --

A. Oh, under the J&J. It says what it says.

Q. That's what it says, isn't it?
A. Well, I'm reading the words with you, sir, but I don't know that I parsed that out all that carefully at the time.
Q. And he's telling you also that Shearman Sterling wants to add to the category of people who could share information under the J&J confidentiality agreement. They want to add these third parties, don't they?
A. That's what he said, yes.
Q. Now, he's also telling you in the -- he says in the next-to-the-last sentence, he says, Ian and Neal are okay with the addition to representatives described, and I'll stop right there. Ian and Neal, that's a reference to Ian John and Neal Stoll, isn't it?
A. Yes.
Q. And he's telling you that they're okay with this change, and you understood that that was from an antitrust perspective; isn't that right?
A. It doesn't say that, but they were antitrust lawyers.
Q. No, I want to know what you understood. You understood that that advice was being given from an antitrust perspective, didn't you?
A. Not -- not quite the way you're saying it, sir. What I understood -- when I got this e-mail, I clearly understood that I had Skadden's blessing for this. I didn't parse out the language of that sentence to say, oh, the antitrust lawyers are

okay with one part of it and I'm okay with the other part of it, and there may be something in the middle that no one's blessing. That did not occur to me.

Q. Mr. Kury, could you turn to Page 259 of your deposition?

A. Can you bring it up? Okay. It's now on the screen, sir.

Q. Okay. And I'm going to ask you if I asked you the following question beginning at Line 1.

"Q. Did you understand Mr. Duwe here to be stating that Ian and Neal indicated that they were okay with this from an antitrust perspective?

"A. Yes."

Did you give me that testimony?

A. I see that, yes.

Q. Now, Mr. Duwe then goes on to say, "The other changes are fine with me;" do you see that?

A. Yes.

Q. And that means the changes other than the addition to representatives described above; isn't that right?

A. That seems to be what he's saying, yes.

Q. So nowhere in this e-mail is Mr. Duwe advising you that it was okay, under the J&J merger agreement, to share Guidant confidential information with potential purchasers of assets to be divested; is that right?

A. In the sense that he doesn't -- that if you parse it out the way you're parsing it out, I guess you can say logically

there was a gap. That was not my understanding. My understanding was that this was Skadden sending it to me, that all relevant parties had signed off on all portions.
Q. So you're basically saying if they send it to you and tell you to sign it, that's good enough for you, right?
A. Not quite. No, I do think about these things, but I didn't think that they were being cute here and trying to say, we're not expressing any opinion on the overall advisability. That would have been completely contrary to my working relationship with Skadden.
Q. I mean, it's pretty clear, when you look at the e-mail and compare the two agreements, that something was being added to the Boston Scientific/Guidant agreement?
A. Language was being added, but I don't know -- I don't think meaning was being changed; so that to make it a violative of the Johnson & Johnson agreement.
Q. You told me before that you understood the requirement in the merger agreement to mean that the two confidentiality agreements had to be consistent, didn't you?
A. Consistent, yes.
Q. And now you're telling me you got an e-mail from someone saying Boston Scientific wants to add something to the Boston Scientific confidentiality agreement that's not in the J&J confidentiality agreement, right?
A. Adding language, but not necessarily adding meaning.

Q. Well, not surplusage. It's not exactly adding a couple of whereas clauses. They're adding people to the definition of representatives who are entitled to receive Guidant confidentiality information, aren't they?
A. My understanding was that they were not changing the substance of the underlying agreement. They were not foolish. They did not think by putting words in here they were in any way amending, modifying or changing their obligations to Johnson & Johnson, and they were fully familiar with the Johnson agreement. And I felt comfortable that, given their expertise, I could rely on their judgment for that.
Q. And you don't know if Skadden did any analysis to determine whether this change was consistent with the J&J merger agreement?
A. It's inconceivable to me that they did not.
Q. I'm sorry, you said it's inconceivable that they did not, but I'm asking you --
THE COURT: Well, you interrupted him. It's inconceivable that?
THE WITNESS: That they would not have conducted the necessary analysis.
BY MR. WEINBERGER:
Q. But my question was not what was conceivable. My question is, is it correct that you don't know if Skadden did any analysis to determine whether this change was consistent with

the J&J merger agreement?
A. If you're asking me did someone say we have or have not done any analysis, I guess I would have to say I don't know that anyone told me that. But, again, given who they were, that it was -- I thought I would have had, if they hadn't told me, every right to assume that they had done what they thought was necessary and that would have included, since they were fully familiar with all the agreements, making a determination that this language was sufficiently compliant or consistent, whatever, so that there would not be a problem with Johnson & Johnson and --
Q. But you don't know if they did any analysis, is that the answer to my question?
A. I think I could say I don't recall specifically someone telling me, yes, we've done the analysis, but I don't think that was a question I needed to ask.
Q. Okay. Now, you now say in your affidavit -- I'm going to quote, you may want to look at it, it's paragraph 19 -- that you "did not understand the use of a customary confidentiality agreement not less restrictive than the confidentiality provisions of the Johnson & Johnson/Guidant confidentiality agreement when providing information to unsolicited bidders as imposing any restrictions on the nature or type of unsolicited bid or bidder to which Guidant could respond by providing company information." Do you see that? I'm going to stop

right there. It goes on, but I'm going to stop right there.
A. You're starting with the, "As I understand it" sentence?
Q. Yes.
A. Thank you.
THE COURT: Wait, you want what's highlighted in yellow, or do you want something else?
MR. WEINBERGER: No, I want what's highlighted in yellow, paragraph 19.
A. 19A?
Q. I'm sorry, I'm sorry.
THE COURT: I think you want the second sentence of 19.
Q. It's the second sentence, as I understand. Do you see that?
A. Let me read it again, sir.
Q. But I'm only asking you about the first part of the sentence, "As I understand it, the purpose of this provision was to ensure that an unsolicited competing bidder would not receive potentially" -- no, I'm sorry. I don't think I'm reading the right section. It's 19A.
A. Okay.
Q. 19A. The first sentence, "I did not understand the use of a, single quote, customary confidentiality agreement not less restrictive than the confidentiality provisions of the JG confidentiality agreement when providing information to

unsolicited competing bidders as imposing any restrictions on the nature or type of unsolicited bid or bidder to which Guidant could respond by providing company information," and I want to stop there. Did you see where I'm reading?
A. Yes.
Q. So the issue here is not what type of bid can be considered by Guidant, is it?
A. Well, it's talking about imposing restrictions on the nature and type of bid.
Q. So there's no claim being made here that Guidant was restricted from receiving any type of bid that somebody wanted to make, is there?
A. I'm not sure what you're saying.
Q. Mr. Kury, do you understand the issue here is to whom Guidant confidential information could be given while Guidant is still under contract with J&J? Do you understand that's the issue in this case?
A. No, I'm not sure what you're saying here. You have me confused.
THE COURT: Never mind that. Do you understand the issue in this case is as was just described? Say it again. No, say it the way --
Q. Do you understand the issue in this case is to whom Guidant confidential information can be given --
A. To whom?

Q. -- while Guidant is still under contract with J&J?
A. Yes.

THE COURT: All right. It's now a little after 1:00; so let's break for lunch. We'll pick up at 2:05. All right? Be ready to go then. Okay? Thank you.

(Luncheon recess)

A F T E R N O O N S E S S I O N

2:10 P.M.

THE COURT: Mr. Kury, have a seat. Thanks. Are you okay with water?

THE WITNESS: Yes, I am. Thank you.

THE COURT: All right. Let's resume.

BY MR. WEINBERGER:

Q. Mr. Kury, I believe where we were was at paragraph 19A of your affidavit, and I asked you about the first part of the sentence, and now I'd like to ask you about the second part of the sentence.

The second part of the sentence says, "nor did I understand" -- maybe I better read the whole thing. "I did not understand the use of 'a customary confidentiality agreement not less restrictive than the confidentiality provisions of the JG confidentiality agreement,' when providing information to unsolicited competing bidders as imposing any restrictions on the nature or type of unsolicited bid or bidder to which Guidant could respond by providing company information."

Now, this is the part I'm asking you about, "nor did I understand it to preclude Guidant from providing information to a bidder's financing sources or potential divestiture partners, as long as the appropriate 'confidentiality provisions' were in place." Do you see that?

A. Yes, I do.

Q. And is that because you think that the definition of representatives was not a confidentiality provision?
A. I don't know that I remember the analysis on that.
Q. Well, this is not a question of remembering the analysis. In fact, this is not anything that you can recall that Skadden told you at the time you were looking at that Boston Scientific confidentiality agreement; isn't that right?
A. I was relying on Skadden for the appropriate confidentiality provision.
Q. But I'm not asking you that.
A. What are you asking me?
Q. I'm asking you whether this analysis, this statement that you didn't understand representatives' definition to preclude providing information to a bidder's financing sources or potential divestiture partners in terms of the confidentiality agreement, that you did not understand that, and I'm asking you --
A. No -- Go ahead.
Q. I'm asking you to confirm that you don't recall Skadden giving you this piece of advice when you signed the Boston Scientific/Guidant confidentiality agreement; am I right?
A. I think we talked about that before lunch. My understanding was -- I think what I said was I'm not sure I can recall a specific conversation with those specific words, but it was clearly my understanding that we could, or that it's

not -- it did not preclude Guidant from providing this information to financing sources or potential divestiture partners.

Q. Now, I'm asking you whether that's because you think that the definition of representatives was not a confidentiality provision?

A. I don't remember that kind of analysis.

Q. Okay. But you told me before lunch, you acknowledged that in Duwe Exhibit 1, Mr. Duwe was telling you that the term representatives did define who was entitled to receive information under the confidentiality agreement, didn't you?

A. I don't think I said it that way.

Q. Shall we look at Duwe Exhibit 1 again? Could you look at it again?

A. If you bring it up on the screen, I will.

Q. Okay. And in Duwe Exhibit 1, isn't Mr. Duwe telling you that Shearman wants to add to the term representatives with whom they can share information, third parties reasonably acceptable to Guidant, who Boston identifies as potential purchasers of the assets to be divested? Isn't he telling you that?

A. Yes, that's what he's saying.

Q. Okay. And, nevertheless, you are stating in your affidavit that the confidentiality agreement doesn't preclude the J&J confidentiality agreement, doesn't preclude Guidant from

providing information to a bidder's financing sources or potential divestiture partners, as long as the appropriate confidentiality provisions were in place; is that right?
A. That's right. I don't think they're inconsistent.
Q. And that's not advice that you got from Skadden when you signed the Boston Scientific/Guidant confidentiality agreement, is it?
A. My clear understanding at the time I signed the confidentiality agreement, was that the addition of that language in the litany of people who were representatives, that did not change the underlying meaning of the basic agreement with Johnson & Johnson.
Q. Okay. But, Mr. Kury, I'm just -- are you saying you do remember that the merger agreement says that the agreement you signed with Boston Scientific has to be not less restrictive to Boston Scientific than the confidentiality provisions of the J&J/Guidant confidentiality agreement; do you recall that?
A. Yes.
Q. Okay. And are you telling us in this sentence that I read you from your affidavit, that the term representatives is not a confidentiality provision?
A. I'm not sure what you're saying. The point I keep trying to make to you is I thought the basic idea was that Skadden would have said and, in effect, advised me, that the Johnson & Johnson language, without the additional language, already

includes, when properly interpreted, these two sources, and that by adding this language at the request of Boston or whoever it was, that we weren't loosening the restrictions.
Q. Your understanding was that Skadden -- your recollection is that Skadden was telling you that the definition of representatives in the J&J confidentiality agreement already included financing sources and potential divestiture partners?
A. Under their interpretation, yes.
THE COURT: You don't remember who told you, or do you?
THE WITNESS: Well, I'm sure that, at the end, it was -- I was relying on Chip. Now, whether there were other conversations at some point with Brian Duwe, I don't know, but ultimately Chip was the person advising me on these matters.
BY MR. WEINBERGER:
Q. So what you now remember is that they said, inherently, the definition of representatives in the J&J Guidant agreement were third-party divestiture candidates and financing sources, as opposed to the term representatives was not in the confidentiality provision?
A. I don't know that. You're asking me some technical point that I'm not understanding.
Q. It didn't matter to you what the rationale was?
A. They were clear that they were mindful of all the relevant provisions, and they knew that whatever they did, Boston had to

be compliant with the agreement with Johnson & Johnson. And my clear understanding, however I got it, was that the addition of some language to the Boston agreement in no way changed their interpretation of the underlying agreement for Johnson & Johnson.

Q. And it didn't matter to you what the rationale was, is that what you're saying?

A. It did matter to me what the rational was. I think what the rationale was was that they already interpreted it that way, the Johnson & Johnson language, without any additions to it.

Q. Now, later in your affidavit you refer to the fact that Merrill Lynch and Bank of America were given due diligence as confirming that advice. Do you recall saying that in your affidavit?

A. I don't recall saying it.

Q. It's paragraph 63 to 66. In there you have a discussion about it.

A. Well, I don't -- Merrill Lynch and Bank of America are somewhat different. I think the Bank of America is applicable. Bank of America was purely a financing source. I think Merrill Lynch may have also been an adviser; so maybe their situation is a little less clear. But the basic point was that if you could allow it to -- Bank of America, that was a financing source, and financing source is not one of the words that's

specifically used in the Johnson & Johnson agreement. So you would have to interpret it in there.
Q. Isn't it a fact that Banc of America Securities was disclosed as a financial adviser to Boston Scientific?
A. I don't know that.
Q. That didn't matter to you?
A. I just don't remember how it was disclosed. I knew they were making loans. That's all I knew about that.
Q. When you wrote this in your affidavit, when you talked about how that confirmed your view --
A. Where are you, sir? What paragraph?
Q. Beginning at paragraph 63.
A. Could you bring it up on the screen?
Q. Did you know that Banc of America Securities was a financial adviser to Boston Scientific?
A. I don't think so.
Q. Now, at the time that you signed the Boston Scientific/Guidant confidentiality agreement, isn't it correct that you were being advised by Skadden not to provide due diligence to third-party divestiture purchasers until there was a definitive agreement between Boston Scientific and Guidant?
A. I recall that I think that was the first bit of advice from Neal Stoll, an antitrust partner, but they subsequently backed off of that.
Q. Well, we'll get to that, but let's first turn to

Exhibit 68, Kury 68, I'm sorry. And Kury 68 contains a couple of e-mails. The one on the bottom is from Alice Rhoten of Skadden to you dated December 12, 2005; do you see that?
A. Yes.
Q. And she says the Bean -- that's Boston, right? Boston Scientific was a code name?
A. Yes.
Q. "Bean seems to be pushing to get confidentiality agreements signed up with potential acquirers in the divested VI and ES businesses. Should this process be starting now, or is it more preferrable to wait until Grape has a signed agreement with Bean" -- Grape is Guidant, right?
A. Yes.
Q. -- "until Grape has a signed agreement with Bean before providing such competitively sensitive information to potential acquirers? Please let me know your thoughts."
Do you see that e-mail?
A. I do.
Q. Do you see on top of that there's an e-mail from Neal Stoll --
A. Yes.
Q. -- also addressed to Ms. Rhoten and to you; do you see that?
A. Yes.
Q. And he says, "Bean can start negotiating such agreements,

however, due diligence will not begin until this is a definitive SPA" -- that's stock purchase agreement -- "between Bean and Grape. Thanks, Neal." Do you see that?
A. Yes, I do.
Q. Now, would you turn to Exhibit 69, Kury 69.
A. Yes.
Q. And do you see on the bottom it's the same e-mail we just looked at from Ms. Rhoten to you?
A. Right.
Q. And there's an e-mail from Ms. Rhoten to you, and you say: "Defer for now;" do you see that?
A. Yes.
Q. And Ms. Rhoten writes to confirm, "I will let Shearman know that we should wait to negotiate confi's with acquirers until after we have a signed merger agreement." Do you see that?
A. I do see that.
Q. Now, there were two reasons for that, weren't there? Were there two reasons? Were you given reasons for why you should wait until after there was a definitive merger agreement?
A. I think it was only an antitrust decision.
Q. Well, one of the reasons -- did Mr. Stoll tell you that one of the reasons was that the FTC would not want a carte blanche process with firms that were just fishing for information, had access to sensitive information about assets that would ultimately be acquired by another party?

A. I don't remember that.
Q. That's an antitrust issue, isn't it?
A. Yes, but I don't remember that.
Q. Do you remember anyone telling you, in addition, that to give such information to a competitor of J&J would diminish the value of the business that J&J would acquire if the agreement closed because competitive information would have been disclosed to a competitor? Do you remember anyone telling you that?
A. I'm not sure I remember, but it wouldn't surprise me that --
Q. That's not an antitrust issue, is it?
A. No.
Q. That's an issue about J&J's rights under the merger agreement, isn't it?
A. No, it's about -- I don't think it was connected with that.
Q. Well, that would be a reason why J&J would not want that information being given to a competitor, isn't it?
A. I don't know. I don't remember thinking about that. My recollection of this whole process is that Neal Stoll originally said that defer, we shouldn't do that. There was no one else saying anything else. I said, okay, defer for now. And then subsequently, both Neal Stoll and Ian John relented on that, did not insist on that, and we went forward with the process. We did, and that was not only okay with them, but it

was also okay with the corporate people.
Q. Okay. We'll see what Neal Stoll says later when we get to it. For now, let me ask you, do you recall executing, on or about December 18th, something called an addendum to the Boston Scientific/Guidant confidentiality agreement? Look at Kury Exhibit 21.
A. Yes, let me think for a minute.
Q. Look at Kury Exhibit 21, Mr. Kury.
A. Yes, okay.
Q. Do you see here Miss Rhoten is transmitting the final copy of the addendum to the confidentiality agreement?
A. Yes.
Q. Do you see that?
A. Yes.
Q. And do you see on Bates No. 133824, that's your signature?
A. Yes.
Q. And isn't it correct that you have no recollection of asking any questions or getting any advice from Skadden with respect to this document?
A. I don't recall whether I had any questions, but if I had, I would have asked them and that would have been satisfied.
Q. That's not my question. My question is, you don't have any recollection of asking any questions or getting any advice from Skadden with respect to this document?
A. That's correct.

Q. And this -- in this document you agreed, did you not, not to disclose the identity -- well, you agreed to a couple of things.

In this addendum you provided that, in no event shall any highly confidential material be provided or disclosed to any third party who was a potential purchaser of Guidant's assets to be divested or of any such party's representatives without the prior express consent of Guidant, right?

A. Yes.

Q. And you also agreed that any persons given access to highly confidential materials had to sign a form of accession agreement that stated that such persons "have been retained by Boston Scientific or Guidant, as the case may be, to advise it in connection with the potential transaction"? That's on page Bates No. 3826.

A. What is that you are citing? Is that the accession agreement itself?

Q. Yes, the form that was attached to the addendum.

A. I'm not sure I was very familiar with that because this was primarily an antitrust document, but I see the language.

Q. Well, Mr. Kury, you signed the agreement and the accession agreement was attached to it, right?

A. Yes.

Q. And the agreement provided that anybody who was going to get due diligence had to sign that accession agreement; isn't

that right?
A. That's correct.
Q. And the accession agreement said that the person who was signing it has been retained by Boston Scientific or Guidant, as the case may be, to advise it in connection with a potential transaction; is that right?
A. That's what the language says, yes.
Q. Now, on December 20th, do you recall that Boston identified Abbott as the potential purchaser? And again --
A. Yes.
Q. -- look at Best Exhibit 18.
THE COURT: Let him just answer. Do you remember --
THE WITNESS: That they were identified as a potential purchaser? At some point, they were. Yes, your Honor. I don't know precisely.
BY MR. WEINBERGER:
Q. I'd like you to confirm that it was on December 20th. So if you could look at Best Exhibit 18?
A. Yes, I see that.
Q. Okay. And this was the document by which Mr. Cornelius was informed that Abbott had been selected as the potential purchaser; is that right?
A. Yes.
Q. And Abbott and Boston -- I'm sorry, Mr. Nicholas requested that Abbott be provided with due diligence; is that right?

A. Yes.
Q. But even then, Mr. Stoll still maintained that due diligence should not be provided to potential divestiture partners -- purchasers, I'm sorry, until after there was a signed agreement between Boston and Guidant; isn't that right?
A. Yes, I guess he did. We talked about this several times in the last ten minutes.
THE COURT: Well, just answer the questions.
THE WITNESS: Well, yes.
THE COURT: I mean, if you don't want to be here, I guess we can do something about that.
THE WITNESS: Sorry, your Honor.
THE COURT: Okay.
BY MR. WEINBERGER:
Q. Would you turn to exhibit -- Kury Exhibit 71. Do you have that in front of you?
A. Yes, I do.
Q. Okay. This is an e-mail that you got from Mr. Stoll on December 20th; is that right?
A. Yes.
Q. Okay. And in this e-mail Mr. Stoll says in the beginning, "this is getting out of hand;" do you see that?
A. Yes.
Q. You're one of the recipients of this e-mail, weren't you?
A. Yes.

Q. And he says, "There can be no third party VIDD" -- that's vascular intervention due diligence; do you understand him to be saying that?
A. Yes.
Q. -- "until we have a signed accession agreement and know the identity of the third party. If it's Abbott, my earlier e-mail sets forth the ground rules for due diligence." Do you see that?
A. Yes.
Q. And he also talked about -- I'm sorry. At the bottom of the e-mail he says: "This is going too fast and is unnecessary;" do you see that?
A. Yes, I do.
Q. And he says, "Please consider my comment regarding the importance of having a deal with Bean prior to allowing in-depth third party due diligence;" do you see that?
A. Yes, I do.
Q. So he was still maintaining his position on the very day that you were notified that Abbott was the buyer or the potential purchaser of choice, wasn't he?
A. Yes.
Q. And then in the middle of the e-mail he talks about the impact of Boston Scientific's demands for diligence to divestiture candidates on Guidant's obligations under the merger agreement, doesn't he?

A. I see that language.
Q. He says, "Bottom line, Bean is using as leverage our strategy to maximize our position relative to J&J's rights under the merger agreement and not reach any negative or other covenants by taking control of and excluding Skadden from the DD process;" do you see that?
A. Yes.
Q. Boston put tremendous pressure on Guidant to provide due diligence to Abbott, didn't they?
A. It did.
Q. If you look at Kury Exhibit 70, Exhibit 70, in the middle is your e-mail to John Lapke and Neal Stoll. Just tell us who John Lapke was?
A. John Lapke was a lawyer out on the West Coast with the division that handled the DES aspects of the business.
Q. He was a Guidant lawyer?
A. He was a Guidant lawyer.
Q. And you sent this e-mail to him and to Neal Stoll; isn't that right?
A. Yes.
Q. And you said, "We are under tremendous pressure from Boston to accommodate Apple; so let's do what we can without violating the AT" -- that's antitrust?
A. Yes.
Q. -- "constraints, reasonably interpreted, or otherwise

shooting ourselves in the foot;" do you see that?
A. I do.
Q. If you look at John Exhibit 21, John Exhibit 21, a series of e-mails, one of which is the one I just read to you about being under tremendous pressure. And then Mr. Capek says to you, "We are trying to be responsive yet responsible;" do you see that?
A. Yes, I do.
Q. And then on the top, you say to Mr. Capek, on December 21, "I know that. My messages are aimed at others and creating a record that I am kicking butt as Pete Nicholas demanded;" do you see that?
A. I do.
Q. And Pete Nicholas was the CEO of Boston Scientific?
A. Yes.
Q. And that's what he demanded?
A. Yes.
Q. Please take a look at Exhibit 31, Kury Exhibit 31. Kury Exhibit 31 is an e-mail from Mr. Cornelius to you; is that correct?
A. Yes.
Q. And Mr. Cornelius is telling you that Mr. Nicholas continues to be concerned about the speed of two due diligence items, and then he says what they are. Do you see that?
A. Yes.

Q. He says, "When can due diligence on VI be cleared and scheduled," right?
A. Yes.
Q. And lastly on this point, can you look at John Exhibit 8. It's -- the bottom e-mail is an e-mail from Ian John of Skadden to you dated December 22nd; do you see that?
A. Yes.
Q. And in this e-mail, Mr. John points out to you the highlighted material, "Brian is growing concerned that the longer we wait to provide greater access to the materials to" -- I assume he meant to say -- "the more educated Apple will become;" do you see that?
A. Yes.
Q. You were aware that Abbott was extremely anxious to get due diligence?
A. Yes.
Q. And to get it quickly?
A. Yes.
Q. And that Boston was applying a lot of pressure on you to make that happen; isn't that right?
A. Yes.
Q. And you committed to do all you could reasonably -- all you reasonably can to give access, didn't you?
A. Yes, I do.
Q. If you look at Kury Exhibit 72, Exhibit 72. In the middle

e-mail is your e-mail to Mr. John and Mr. McConnell. Just tell us who Mr. McConnell was?
A. He was a businessman, a fairly senior businessman at Guidant, and I think he was helping with the due diligence process.
Q. Was he the chief information officer?
A. I'm not sure what his title was.
Q. Was he in charge of the due diligence process? In any event --
A. He had something to do with it, but I don't remember precisely whether he had specific responsibility for it.
Q. Okay. In any event, you said to him -- you said to Mr. John, "When Bill McConnell arrives, I suggest you have a come-to-Jesus meeting with Apple, Bean and their bankers and lawyers. Figure out what the problems are and come up with a plan. Our commitment is to do all we reasonably can to give access, subject to antitrust constraints and protecting ourselves against premature or unnecessary disclosure of sensitive information to competitors or potential competitors." Do you see that?
A. Mmm, hmm; yes.
Q. And you weren't concerned when you wrote this e-mail about whether that access was consistent with the merger agreement, were you?
A. I don't think that's fair. I think we were, at all times,

mindful of the requirements of the Johnson & Johnson agreement.

Q. Now, in your --

THE COURT: What's your basis for saying that?

THE WITNESS: My basis for saying that is that I think throughout the process, both I and Skadden Arps were always mindful of the fact that we had agreements with Johnson & Johnson, and we didn't want to take any action which would present any risk of a violation because that could have serious consequences for us. So that was always the background against which the other things were being evaluated.

(Continued on next page)

THE COURT: Is there any reference to the J&J agreement in this email?

THE WITNESS: No, but obviously a number of the addressees, such as Mr. Mulaney, were very mindful of those things. And this was something being sent to basically to McConnell and John. I don't know that they were front and center on the Johnson & Johnson agreement.

Q. On that subject, in your affidavit, Mr. Kury, you state in paragraph 79 that you were advised by Mr. Mulaney that given Abbott's role in Boston Scientific's offer, it was proper under the J&J/Guidant merger agreement for Guidant to provide Abbott with due diligence. Do you remember that?

A. Yes.

Q. And that advice you claim was given to you before due diligence was provided to Abbott on or about December 22?

A. Yes.

Q. And you can't even tell me the basis for that advice as you sit here today. Isn't that right?

A. I don't think that's correct.

Q. Let's start this way. You can't even tell me whether the advice was given to you explicitly or implicitly, can you?

A. I can tell you that I was advised by Mr. Mulaney very clearly that we could do this. My understanding at the time was, and always was throughout the transaction, that the basis of reliance was it's Skadden's view that Boston and its divestiture partners and financing sources could be provided with information, and in the case of Abbott or Bank of America, the basis was that they were representatives.

THE COURT: Do you remember him saying that in December?

THE WITNESS: I cannot say in conversation or conversations with him that he specifically said, "And I'm telling you, Bernie, they're representatives," but that was the clear message I was taking away from the conversation.

THE COURT: You had that kind of familiarity with the agreement?

THE WITNESS: Yes.

THE COURT: You were focused on the language of 4.02?

THE WITNESS: Yes.

THE COURT: And you were focused on the language of the confidentiality agreement with J&J?

THE WITNESS: Yes.

THE COURT: You were reading it around this time?

THE WITNESS: Yes.

THE COURT: And refreshing yourself on it?

THE WITNESS: Yes.

THE COURT: And having conversations with Mr. Mulaney about it?

THE WITNESS: Yes.

THE COURT: Any emails about this?

THE WITNESS: Not that I know of.

THE COURT: Have you ever seen any?

THE WITNESS: Not that I know of.

Q. Mr. Kury, I'd like you to look at your deposition, open your deposition to page 276. Actually, I think you have to go back to page 275. I'm sorry. I have to read a lot of this to you in order to make sure I have fairly given you all of the background.

I was showing you the letter Mr. Deyo wrote to you on January 23 which we'll talk about later, and I asked you the following questions and I'd like to know if you gave me the following answers:

"Q. And you understood him to be alleging that he believed based on the facts that he was asserting in this letter that there was a breach of the agreement, didn't you?

"A. No, I didn't infer that he believed it. I understood that he was saying that.

"Q. Fine. OK. You understood he was communicating to you --

"A. Yes.

"Q. Just let me --

A. He was asserting.

"Q. You understood that he was asserting that there had been -- based on the facts as he understood them, there had been a breach of the agreement. Is that right?

"A. I think so, yes.

"Q. And am I correct that that letter that you sent back to him -- it was an email and I think there was later a letter -- does in fact represent or did in fact represent Guidant's view at that time as to why it was entitled to provide due diligence to Abbott under the no-solicitation provision?
"A. Yes.
"Q. And there were no other reasons?
"A. That's correct.
Q. I'd like to explore the reasons that you provided in the letter Exhibit 51. The first thing you stated here in the last sentence in the third paragraph, you say, "In addition, a takeover proposal may be made by one person or joint bidders. Is that correct?
"A. It speaks for itself.
"Q. That's just a predicate to my question that that's what it says. I think in your prior testimony you testified that you believed that Abbott was a person involved in making the bid. I can show that to you if you need to.
"A. It speaks for itself.
"Q. That's what you believe. Is that right?
"A. Yes, that's what I said.
"Q. When did you reach the conclusion that Abbott was a person involved in making a bid?
"A. This goes back to my earlier -- your earlier questions and my earlier answers going back to the first time that Abbott

appeared on the scene. I had some kind of explicit or implicit discussions with Skadden about whether it was appropriate to deal with Abbott however they were going to deal with Abbott; and I received the impression or understanding that it was -- I don't know that at the time I did a technical analysis as to just how it parsed out under the contract. I was relying on Mr. Mulaney for that."

Did you give me that testimony?

A. It's there, yes.

Q. So when this issue was raised, you just had some kind of explicit or implicit discussion with Abbott about whether it was appropriate to deal with Abbott, didn't you?

A. With Abbott or with Skadden, did you say?

Q. I'm sorry. When this issue was first raised, you had some kind of explicit or implicit discussion with Skadden about whether it was appropriate to deal with Abbott, didn't you?

A. Yes, I did.

Q. And you don't even remember what the basis for it was, do you?

A. I think my understanding, whatever I said, my basic understanding throughout the transactions, we were viewing Abbott as a representative.

Q. I'm asking you now, isn't it a fact that when I asked you this question at your deposition, you said you did not know what the technical analysis was?

A. Well, the words are there, but what I exactly meant by that, whether I was parsing it out in terms of advisor, representative or whatever, the point was I was clear from my conversation with Chip that it was -- he thought it was very much OK. I don't think he thought it was a close question. He had thought about it, and I was basically relying on it; but as I reflect on it, I think the only thing he was thinking of was that they were a representative.

THE COURT: You're saying that because you're surmising that or you have a recollection of him saying that?

THE WITNESS: I don't know that I can say, your Honor, that he actually said, "Bernie, they are a representative." But I think that was the understanding I took away from the overall set of conversations.

THE COURT: But what we just read, there was a discussion about a joint bidder, right?

THE WITNESS: If it's in there -- I don't remember, but if it was, that's what I said at the time, but I don't think it's -- I ever really relied on any bidder analysis.

THE COURT: You don't think you relied on any bidder analysis?

THE WITNESS: There is always in my mind a representative thing that was the basis for --

THE COURT: But that isn't in what we just read, right? I didn't see anything about representative in there.

Did I misread it?

THE WITNESS: I said that I don't recall him specifically said they are a representative; but as I am reflecting on it, I think that's what he meant.

THE COURT: So since the deposition, you have reflected on it and come to the conclusion that that must have been what he meant?

THE WITNESS: I think that my understanding as I've tried to parse it out was that it was a representative. Now, whether I had it at the time of the deposition or I thought about it subsequently, but my understanding was oftentimes afterward upon reflection, he was talking about representative.

Q. Mr. Kury, paragraph 79 and paragraph 80 are the paragraphs in which you describe the advice that you say was given to you by Mr. Mulaney that given Abbott's role, it was proper under the merger agreement for Guidant to provide Abbott with due diligence. Isn't that the way you describe that?

A. What paragraph are you in, sir?

Q. Paragraph 79.

A. Well, that is certainly true.

Q. Sorry, sir?

A. I was advised -- given their role, it was proper.

Q. You don't state here that Mr. Mulaney advised you that Guidant was a representative of Abbott, do you?

A. I don't state that, no.

Q. You didn't state that when I asked you that in your deposition, did you?
A. I don't think I did, no.
Q. Now, when you got this advice you say you got, you didn't ask for any written legal analysis, did you?
A. No, I did not.
Q. On lots of other issues where you communicated with Skadden, you got written legal analysis, didn't you?
A. Not often. I don't recall that I did. I mean, there are some memos that were prepared, guidelines for going forward, that kind of thing, but this question of providing diligence was basically a go/no-go decision, and I didn't ask for a second opinion. I didn't think I needed one.
Q. I'm not asking you about a second opinion.
A. Or get an opinion in writing.
Q. This was not important. You didn't view this as an important issue?
A. I thought it was an important issue, but I thought I had the best law firm in the world that would advise me on this, not only because of their preeminence but because they'd been involved every step of the way for 16 months and worked on, negotiated and drafted all the relevant agreements, and I thought that they were in the best possible position to give me advice that I could rely on.
Q. And the rationale for it is not something that was

important to you?
A. My general understanding was that the -- they were viewing, at least at a general level, that they were viewing Abbott as being part of the Boston team, and --
Q. I'm sorry?
A. And, in effect, as a representative, but I cannot swear to you that they actually said to me, "Bernie, they are a representative" and nothing else.
Q. You said two things. You said part of a Boston bid, and you said representative. Which one?
THE COURT: Boston team.
Q. Team. I'm sorry. I withdraw the question.
Would you look at John Exhibit 4. This is a memo that was prepared for you at your direction by Mr. Stoll and Mr. John, right?
A. Yes.
Q. About gun-jumping and information exchange guidelines?
A. Yes.
Q. Look at Mulaney Exhibit 21. Before you look at 21, go back to John 4. The issue there was how and when you could give certain information to people, wasn't it?
A. Yes.
Q. And you asked for and you got a memorandum, an analysis. Is that right?
A. I haven't read this in many years, Harold -- counselor --

but this is the kind of thing I referred to a minute ago about sometimes we got memos telling us how to act over the course of time, sort of forward-looking documents dealing with questions that may come up periodically.
Q. Look at Mulaney Exhibit 21. Without going into a lot of details, would you agree with me that this is an exchange, an email exchange that you had with Mr. Duwe about what your obligations were to J&J under the merger agreement with respect to the provision of certain documents that J&J had asked for. Is that right?
A. Yes.
Q. Would you look at Strain Exhibit 6. Again, without getting into the details of this, would you confirm for me that Strain Exhibit 6 is an email, or a memo -- I'm sorry -- is an email attaching a memo that was written for you by Mr. Duwe describing issues relating to conditions in Boston Scientific's financing?
A. Yes.
Q. Would you look at Defendant's Exhibit 0176. That would be in the other book. Would you agree with me that the bottom half of this document is an email in which Mr. John provides for you in writing some ground rules for diligence to be given by and to Guidant and Boston Scientific in writing?
A. Yes.
Q. Would you look at Defendant's Exhibit 178. Would you agree

with me that the top email here is another email from Mr. John describing or addressing certain issues about what documents should be given to Abbott and Boston Scientific?
A. Yes.
Q. Do you know that there are hundreds and hundreds of emails and other documents that were exchanged between you and Skadden which are characterized as seeking legal advice?
A. I don't know that.
Q. I'm not finished with the question. Seeking legal advice. Do you know that?
A. No, I don't know that. I'm surprised if you tell me that, but I don't remember.
Q. Do you know that not a single one reflects the advice that you claim Mr. Mulaney gave you before due diligence was provided to Abbott on December 22, 2005?
A. I don't know that.
Q. Now, in your affidavit at paragraph 80, you point to what you say are numerous other documents and communications that you say "assured me that Skadden viewed Guidant's provision of due diligence to Abbott as consistent with Guidant's obligations and gave careful consideration to every aspect of providing due diligence information."
Do you see that?
A. Yes.
Q. Isn't it correct that not one of those documents addresses

the question of whether Abbott is entitled to receive Guidant confidential information under the merger agreement with Johnson & Johnson?

A. That decision had already been made.

Q. You said in your affidavit, you cited these documents as documents that assured you that Skadden viewed Guidant's provision of due diligence to Abbott as consistent with Guidant's obligations, do you not?

A. I'm not sure what you're saying, counselor, but my point is that I had the basic advice from Mr. Mulaney that we could provide it, and then thereafter we frequently provided it, due diligence -- information to Abbott and Skadden was involved at every step of the way. And in terms of selecting the due diligence, getting it over to them, putting any appropriate legends on them for antitrust purposes. They were throughout acting as if this was completely proper and not a problem.

Q. OK. But is it your testimony, as it is stated in this affidavit, that these documents assured you that Skadden viewed Guidant's provision of due diligence information to Abbott as consistent with Guidant's obligations under the merger agreement?

A. Yes. Yes.

Q. And none of these documents address that issue. Isn't that right?

A. Well, they were dealing with how to handle due diligence.

THE COURT: So how do they assure you?

THE WITNESS: Well, they were heavily involved throughout, and I don't think they would have been heavily involved throughout, your Honor, if they thought this wasn't permitted.

THE COURT: Well, it certainly doesn't say the documents are consistent with that view, but you say these documents and communications assured you that Skadden viewed the provision of due diligence to Abbott as consistent with their obligations.

So I'm just trying to figure out what in those documents assured you of that.

THE WITNESS: I don't know that the contents of some of the documents did that, but the process that they were providing these documents with the blessing and help of Skadden made it clear to me that they were on board, fully on board with this process of providing information and that he thought it was proper.

Q. So the mere fact that they were providing the due diligence assured you that they had come to the conclusion that it was appropriate or permitted under the J&J merger agreement?

A. Yes, that's the inference I drew from that. Yes.

Q. Would you turn to Kury Exhibit 22. Do you recognize this document as an accession agreement that you signed on behalf of Guidant?

A. Yes.
Q. This is a negotiated form of the accession agreement that we looked at when we looked at the addendum that you signed, remember?
A. Yes.
Q. This agreement was signed by Abbott and Guidant in connection with the provision of due diligence to Abbott. Is that right?
A. Yes.
Q. It recites that Abbott Laboratories has been retained by Boston Scientific to advise it in connection with a potential transaction. Do you see that?
A. Yes.
Q. You knew that that was not the real purpose for which Abbott was getting diligence, didn't you?
A. I didn't think of them, at least primarily, as an advisor.
Q. In fact, you knew that the real purpose for which Abbott was getting diligence was that it was considering the purchase of assets that Boston Scientific wanted to divest. Isn't that right?
A. That's correct, or that's the main thing, the main purpose of it.
Q. Yet you signed an accession agreement that recited that Abbott had been retained to advise Boston Scientific, didn't you?

A. I did.

Q. And you had no information indicating that that statement was true, did you?

A. I didn't think it did. My impression was it was not considered to be a substantive matter that Abbott was -- in terms of the Johnson & Johnson agreement, it was whatever it was. Whatever this accession agreement did had nothing to do with changing the agreement with Johnson & Johnson. For us to give information to Abbott under the Johnson & Johnson agreement, we had to comply with the terms of the Johnson & Johnson agreements; and if for any reason the word advise came in here, that didn't change anything.

THE COURT: Well, is it false or is it true?

THE WITNESS: It was not something that I considered significant at the time --

THE COURT: So a false statement that is not significant is OK to sign on that kind of a document? You're a lawyer, right? You're a lawyer, correct?

THE WITNESS: I am a lawyer.

THE COURT: So it doesn't trouble you to sign a document that is inaccurate or arguably completely false in its characterization of the relationship between Abbott and Boston Scientific?

THE WITNESS: There was no substance involved there. Abbott knew what they were doing; Boston knew what they were doing; and presumably Guidant knew what they were doing. If they for whatever reason were drafting peculiarities or they were using a form that they filled in blanks or whatever, it didn't change anything and no one was misled.

THE COURT: So you don't mind signing on to a document that is inaccurate and false as long as nobody is going to be misled.

THE WITNESS: Your Honor, I always prefer to have everything accurate, but I think I did raise a question about this and --

THE COURT: You don't want to be fanatical about it.

THE WITNESS: I raised a question about whether or not this raised any problems with any kind of a substantive change or anything, and I was advised it didn't make any difference.

THE COURT: Who advised you of that?

THE WITNESS: I raised it with somebody, I think, at Skadden, but I don't remember who advised me on it, sir.

MR. WEINBERGER: May I follow up on that, your Honor?

THE COURT: Yes, you may.

Q. I want to come back a little bit to the statement, but I just want to touch on what you just told the Judge that you were advised about this by someone from Skadden.

Do you recall testifying in your deposition in 2009 that you had no recollection of questioning this statement when you signed this agreement?

A. I've changed that. I think I said in my --
Q. I asked, do you recall testifying in 2009 that you had no recollection of questioning this statement when you signed this agreement?
A. That was my recollection at the time, sir.
Q. And you recall you have no recollection of receiving any specific advice of entering into this agreement -- sorry.
Do you recall testifying in your declaration in support of a motion for summary judgment that you had no recollection of questioning this statement --
A. I do.
Q. -- when you signed this agreement?
Do you recall that?
A. I do.
Q. And now in 2014 you're stating in your affidavit and your testimony that you just gave in response to the Judge, now you're stating that you all of a sudden remember that you were advised by Skadden. Is that right?
A. That's right. I was trying to be accurate as to what I remembered at this date when I was preparing the latest document.
THE COURT: When did you come to this recollection?
THE WITNESS: Actually, in connection with preparation of this affidavit.
THE COURT: About how long ago was that?

THE WITNESS: Several -- a month or two, whenever we were preparing the trial -- what was it? A trial affidavit? Yes.

THE COURT: What was it that you remembered that you didn't remember before?

THE WITNESS: I remembered as I focused on it again that the -- the word advise struck me as being something a little -- I don't know, stood out to me in some way and I wondered about it, and I think I talked to someone at Skadden, why is this in there, and the basic advice I received was that not to worry about it, it was not a problem, and I went along with that.

THE COURT: But you don't remember who at Skadden?

THE WITNESS: I do not, sir.

THE COURT: Go ahead.

BY MR. WEINBERGER:

Q. Just to be clear, your recollection as you sit here today is you specifically raised this issue with someone at Skadden, he told you it was OK, and you signed it. Is that it?

A. That's correct.

Q. Even though it is not true?

THE COURT: You mean the statement in the agreement is not true?

Q. Correct. Even though the statement in the agreement about Abbott being retained is not true?

A. I wasn't thinking of it that way.
Q. Well, it wasn't true, was it?
A. So far as I know, the primary characterization of Abbott at that time would have been something other than advisor, but ...
Q. So you knew that; they knew that; they invite you to sign it; and you sign it, right?
A. I did sign it, yes.
Q. After getting advice from Skadden?
A. I did.
Q. Now, are you aware of any reason why this agreement would have said Abbott Laboratories has been retained by Boston Scientific to advise it in connection with a potential transaction?
A. No, I relied on Skadden for that.
Q. You are aware, are you not, that there has been testimony in this case that there was no antitrust reason for characterizing Abbott as a representative in order to justify the provision of due diligence to it?
A. I'm not aware of that.
Q. Let's turn to a different subject.
Were you aware of a co-promotion agreement between Johnson & Johnson and Guidant?
A. What was your question, counselor? Am I aware that there was a --
Q. Co-promotion agreement.

A. I think I was aware that there was one. It was not something I was particularly familiar with.
Q. Let me see if I can refresh your recollection. Do you remember there was an agreement whereby Guidant was co-promoting Johnson & Johnson's site for drug-eluting stent in exchange for getting some technology called rapid exchange technology. Do you remember that?
A. Only in vague terms.
Q. Do you remember that Abbott wanted access to that agreement as part of its due diligence?
A. I don't know that I remember that. I'm not saying I didn't. At this point you are asking me here today, I don't have a memory of that. But I'm not denying I did or I didn't.
Q. I asked you a more specific question. Do you remember Abbott was concerned about whether or not if Abbott bought Guidant's VI and ES business, whether that agreement would be transferable to it? Does that refresh your recollection?
A. I have some vague recollection of that issue coming up, yes.
Q. Why don't you look at John Exhibit 20.
A. Yes.
Q. Do you see the bottom email, the bottom full email dated December 23, 2005 is an email from John Capek. First tell us who is John Capek?
A. John Capek was an executive out on the West Coast working

with the DES line.
Q. He was a Guidant employee?
A. Guidant employee.
Q. In fact, he was sort of the head guy on the VI/ES business, wasn't he, for Guidant?
A. Yes, I think so.
Q. And he's sending you and Ian John an email asking had they asked about the co-promotion agreement and its transferability? Do you see that?
A. Yes.
Q. Does that refresh your recollection as to whether Abbott had requested that?
A. Yeah, I assume so. I would say yes, that's what it seems to say.
Q. In fact, Mr. Kury, Abbott had threatened to walk away from the deal if they didn't get access to that information, didn't they? If you look you could look at the next --
THE COURT: Let him answer the question. Is that accurate?
A. I don't remember that.
Q. Take a look at the bottom email that goes over to the next page. It's an email from Mr. John to Mr. Kury, to you, dated December 21, 2005. Do you see that?
A. Yes.
Q. If you turn to the second page, it says: Abbott has also

asked us to allow their in-house counsel to see the IP license agreements, which, if we allowed Bean will also demand as Bean has also made a similar request. We are OK with this from an antitrust perspective so long as the in-house lawyers are not involved in it and have no relation to the agreement or the confidentiality provisions. Abbott called having this access critical and said if they were not given this access, they would walk from the deal (but then they said that about a lot of things)."

Do you see that?

A. Yes, I do.

Q. And do you remember that?

A. Only vaguely. This is not a subject I think I spent a lot of my time personally on.

Q. Do you remember that this co-promotion agreement had a confidentiality provision in it?

A. No, I don't remember that.

Q. Take a look at John Exhibit 23. Let me know when you get there. I think you are going to have to look at this in the book.

A. Where is it, counsel?

Q. Marco, put the first page of the agreement on which is SS19750. This is the sales promotion agreement between Advanced Cardiovascular Systems, Inc. and Guidant Sales Corporation and Cordis Corporation and Cordis LLC. So Advanced

Cardiovascular Systems, that was the Guidant VI/ES business, wasn't it?
A. Yes.
Q. And Guidant Sales Corporation is also Guidant company?
A. It's a subsidiary, yes.
Q. The two Cordis corporations were J&J companies. Is that right?
A. That is correct.
Q. If you go look at the page Bates numbered 19753?
A. Is it coming up?
Q. Do you see the provision that says 1.5 confidential information?
A. Yes.
Q. If you go down eight lines, there's a sentence that says as follows: "As used herein confidential information shall also include the material terms of this agreement and any Cordis marketing summary."
Do you see that?
A. Yes.
Q. If you go to page 19770, you see there is a provision section entitled confidentiality?
A. Yes, I do.
Q. About halfway down, it says "Except as provided in this agreement, each of the parties shall not communicate any portion of the confidential information of the other party or

its affiliates, any other person, corporation or entity without first obtaining prior written permission from the other party." Do you see that?

A. Yes, I do.

Q. And you were fully aware, were you not, that complying with Boston's and Abbott's request to get this material would run afoul of these provisions, weren't you?

A. No, I wasn't. Not that I recall.

Q. Take a look at John Exhibit 13. You see that's an email that was sent from Ian John to you on December 22, 2005?

A. I see that.

Q. You see about a little more than halfway down there's a sentence that we have outlined for you here that says, "We continue to need." Do you see where I'm reading from?

A. Yes, I do.

Q. This is Ian John saying to you, "We continue to need to consider, however, the confidentiality clauses in the license and related agreements. In particular, the limitations imposed by the Juice agreements. John Lapke and I just discussed that issue and think it would be worthwhile for a group of us, i.e., John L, Bernie, Brian and me, to discuss the various risks of meeting Bean's and Apple's request to share those agreements with in-house counsel."

Do you see that, sir?

A. I do.

Q. Are you aware that the actual agreement was placed in the data room to be made available to Abbott?
A. I wasn't aware of that.
Q. Take a look at John Exhibit 20. Again, you see the top emails from Mr. John to Mr. Capek and to you?
A. Yes.
Q. It says, "They have asked for copies of all licenses and related agreements (including the co-promoter) to be placed in the data room as category to materials. We have done that." Do you see that?
A. Yes.
Q. Now, they also wanted to know whether that agreement would be transferable, didn't they?
A. Yes.
Q. And there was a schedule showing to who the agreement was not transferable to, and Abbott wanted to see that, didn't they?
A. Yes.
Q. Would you look at John Exhibit 25. While you're looking at it, as the agreement was placed in the data room, the schedule was not attached to the agreement. Isn't that right?
A. I don't know.
Q. Right. Well, take a look at 25. Exhibit 25 on the bottom is an email from Mr. McConnell to you dated December 23. Do you see that?

A. Yes.
Q. And he's asking you for guidance on two issues. Do you see that?
A. Yes.
Q. The second issue is "Apple wants access to schedule from the Cordis co-promotion agreement that shows whether Juice can cancel the agreement if we are sold to Bean or Apple. Obviously, they need to know. They're listed on the schedule and are excluded. I am sure there is a confidentiality protection that prevents us from giving them the schedule, but we need to find a way to let Apple know they're on the schedule while avoiding others who are listed. Can we just tell them or can our attorneys tell their attorneys they are listed?"
Do you see that, Mr. Kury?
A. Yes, I do.
Q. And he's asking for your advice, right?
A. Yes.
Q. And you sent it to Mr. Duwe with two question marks, right? That's what you do, up above?
A. Yes.
Q. You don't say, "Of course you can't. There's a confidentiality provision that says the material terms of this agreement are confidential." You send it to Mr. Duwe, right?
A. I'm sending it to Mr. Duwe. I'm basically asking him for -- to review this and let me know what to do.

Q. Yes. And what did he do?
A. I'm not sure what he did.
Q. Yes. He called you. He told you, "Don't worry, I took care of it. We let Abbott's lawyers know," didn't he?

THE COURT: Did he do that? That's a question. Did he do that? Did he Tale call you and tell you?
A. --

THE WITNESS: I don't have any recollection. If there's a document here you can point me to, but I don't recall getting a telephone call from Mr. Duwe about this. I'm not saying I didn't. I'm just saying I don't recollect it. This was an issue I basically let them handle.
Q. Why don't you look to Plaintiff's Exhibit 9. You see the second email from Mr. Duwe to you?
A. All right. I see it.
Q. Do you see that, sir?
A. Yes.
Q. It's dated December 23?
A. Yes.
Q. And you say on the second issue -- and the second issue is the second issue addressed in Mr. McConnell's email that we just looked at -- where he says "Apple wants access to the schedule. Can't we just tell their lawyers?" Do you see that?
A. Yes.
Q. Mr. Duwe says, "On the second issue, we have informed their

counsel that Abbott is on the schedule." Do you see that?
A. Yes, I do.
Q. "The Confi provisions of the co-promote are more general and do not expressly apply to the terms of the agreement or schedules, so this should be taken care of as well."
Do you see that?
A. Yes, I do.
Q. That was palpably untrue, wasn't it?
A. Not that I know of.
Q. I just showed you the confidentiality agreement that says the terms of the agreement are confidential?
A. I relied on Skadden for this issue. This was not an issue that I personally invested a lot of time in. I did not critique all the agreements. I left it to Skadden. If I thought there was an initial question, I put it to Skadden. Mr. Duwe, who was a partner there working with Mr. Mulaney, addressed it and thought it was appropriate, and I relied on that.
Q. You were asked by one of your Guidant employees for legal advice on whether notwithstanding a confidentiality provision in one of your agreements, a lawyer could be told about something that was in that agreement. You were asked for that, right?
A. I was.
Q. And you just passed it on to Mr. Duwe?

A. There were many things in this transaction where I had to rely very heavily on Skadden both because I didn't have a lot of time, I was a busy general counsel, and I didn't have any particular expertise on the subject matter. I turned it over to Skadden. I thought I was in good hands. And when I was satisfied that they had carefully addressed it, that was fine with me on something like this.

Q. Mr. McConnell in his email pretty much told you that we couldn't tell them this because of the confidentiality provisions of the agreement, didn't he?

A. Mr. McConnell is not a lawyer. He was a businessman. I had said while I think he is a very competent executive, I don't look to him for legal advice. My legal advisor was Skadden.

Q. You think you needed to be a lawyer to know that when an agreement says the terms of this agreement are confidential and someone wants to disclose the terms, that that's a violation of the agreement?

A. If I have asked for advice on this subject, I feel confident that they would have evaluated all that and they had a satisfactory rationale, and I was relying on them for that, and I didn't get into too much discussion on it. I was basically looking to them to help me resolve this problem, and they seemed to have done it, and I felt comfortable and went on. I wasn't -- I didn't have a lot of my own energy involved in that question and I thought their advice was perfectly a sound basis for us to go forward. And whatever Mr. McConnell may have thought, that was neither here nor there for me.

THE COURT: You recall that this advice you considered at the time to be sound? Do you remember this email?

THE WITNESS: I remember -- now -- I remember getting this email, and I didn't spend any time thinking it was wrong. I wasn't heavily involved in that. I didn't go back and parse everything out. I was relying on Skadden for the detailed critique, as I frequently did.

THE COURT: What's the detailed critique that you're referring to?

THE WITNESS: Well, I don't have one, but he obviously looked at it and thought it was appropriate to do it, so I thought I had Skadden's approval, and we did what we did.

Q. Do you see that Skadden was acting with "an abundance of caution" which is what you characterize they did in paragraph 90 of your affidavit?

A. I never had any reason to doubt the bona fideness and diligence, knowledge and competence of Skadden.

Q. Do you think that action or that decision was "responsive yet responsible," which is how you say you acted in paragraph 84 of your affidavit?

A. Given the source of the advice, I thought so.

Q. So if the source of the advice is somebody you trust, it

doesn't matter how outrageous it is. Is that what you're telling us?
A. I'm not telling you that. I'm telling you that given my limited knowledge of the subject matter and my reliance on Skadden and their preeminent reputation and expertise, I felt comfortable that they could handle a question of this kind.
Q. Let's look at Section 4.02(c) of the merger agreement. That's Kury Exhibit 9 at page Bates number 26228. The provision contains a number of requirements, one of which is that "The company shall promptly advise parent" -- parent being J&J, right?
A. Where are you reading, counselor?
Q. On page 39, subsection C. You can highlight the whole section. It says, "The company shall promptly advise parent orally and in writing (1) of any takeover proposal, the material terms and conditions of any such takeover proposal (including any changes thereto), and the identity of the person making any such takeover proposal."
I'll stop there. You were aware of that requirement, weren't you?
A. Yes.
Q. Then later on it says, "The company shall keep parent fully informed in all material respects of the status and details including any change to the terms thereof of any takeover proposal." And you were familiar with that requirement as

well, weren't you?
A. Yes.
Q. And it's correct, Mr. Kury, that as far as you know, Guidant never informed J&J of Abbott's involvement, or potential involvement in this action or of Guidant's provision of due diligence to Abbott prior to Boston Scientific's announcement of its definitive offer on, I think it was, January 8?
A. Yes, I'm aware of that.
Q. More specifically, Johnson & Johnson wasn't told that Abbott had entered into an accession agreement with Guidant, was it?
A. Not that I know of.
Q. It was clearly relevant to the status of Boston Scientific's takeover proposal, wasn't it?
A. I don't know that I would agree with that.
Q. Are you aware that Guidant's expert has testified in this very case that the accession agreement was a takeover proposal?
A. I don't know that.
Q. So you're not aware that Guidant's expert has issued a report, filed an affidavit and testified in this court that the accession agreement was a takeover proposal. Is that right?
A. That's my testimony, yes. It's all news to me.
Q. You received no advice from counsel at Skadden as to whether Johnson & Johnson had to be notified that Guidant had

signed an accession agreement with Abbott pursuant to which Abbott was getting due diligence. Isn't that correct?
A. I don't recall asking specifically whether the fact of executing the accession agreement required disclosure to Johnson & Johnson. I don't remember that.
Q. Didn't Guidant not only fail to disclose Abbott's involvement; it agreed that it wouldn't disclose the identity of any potential third-party purchaser. Isn't that right?
A. In the agreement I guess you're referring to the addendum to the Confi agreement? Is that right?
Q. Yes.
A. My understanding is that the execution of the Confi in and of itself didn't involve any violation. We would only have a potential violation if and when we thought we were obligated to disclose to Boston the -- not to Boston -- to Johnson & Johnson the involvement of Abbott. And my understanding was we never reached that point. Up until the time the disclosure was made, my understanding based on a conversation at some point with Mr. Mulaney, is that it was not necessary to disclose Abbott to that point to Johnson & Johnson under those provisions.
Q. My question was a little different. My question was: Isn't it correct that in the addendum Guidant agreed that it would not disclose the identity of any potential third-party purchaser. Isn't that correct?
A. Without consent, that is what it says.

Q. Were you aware that in negotiation of that provision, Guidant had put in a clause that would have allowed it to disclose that information if it was required by a preexisting agreement?
A. I don't know that I knew that.
Q. Why don't you look at Kury Exhibit 18. Kury Exhibit 18 is an email from Allison Rhoten to Mr. Mulaney, Mr. Duwe, to you and Mr. John. Is that right?
A. Yes.
Q. She is forwarding to you Shearman & Sterling's comments on this addendum that was being negotiated at the time. Is that right?
A. Yes.
Q. If you look at page, the page that is Bates numbered 13389--
A. Yes.
Q. -- is it fair to state that what's happening here is that Shearman is asking to add to this addendum the language "Additionally, in no event shall the existence or name of any third party who is a potential purchaser of the company's assets to be divested be disclosed by the company and any person without prior written consent."
A. That's correct.
THE COURT: You were aware of this at the time? You saw a draft this.

THE WITNESS: I think I was, your Honor.
Q. Turn to Kury Exhibit 19. This is -- the bottom is another email from Alison Rhoten to some people, and you are CC'd on this. Is that right?
A. Yes.
Q. You see Alison Rhoten is sending to Deborah Feinstein and Clare O'Brien, both of whom were lawyers for Boston Scientific, a markup of the addendum. Do you see that?
A. Yes.
Q. Do you see on page 131265?
A. Where, counselor? I now see it.
Q. And you see the language that was being proposed by Skadden, "Additionally, except as required by law, a preexisting agreement in no event shall the existence or name of any third party who is a potential purchaser of the company's assets to be divested be disclosed by the company to any person." Do you see that?
A. Yes.
Q. If you look at Exhibit 20, you see that Nathan Sawyer of Shearman is sending Alison Rhoten their markup in return, right?
A. Yes.
Q. You're copied on all of this. In their markup, we go past the clean version to the redline version at page SS131259.
A. Yes.

Q. You see there a clause or preexisting agreements has been stricken. Do you see that?
A. I do.
Q. And that's how it was signed, wasn't it?
A. Yes.
Q. In the end, Guidant agreed it would not disclose Abbott's involvement even if it was required to do so by the merger agreement. Isn't that correct?
A. There was not an exception for a preexisting agreement written into the deal, yes.
Q. In effect, Guidant agreed that even if it was required by the J&J merger agreement to do so, it would not disclose the involvement of any third party or identity of any third party divestiture candidate. Isn't that right, sir?
A. No, I wouldn't characterize it like that.

(Continued on next page)

Q. That's what it said?
A. They did not -- my understanding -- I have a twofold understanding with respect to this matter. One is, in Skadden's view, they were not required to disclose this to Johnson & Johnson. So we never faced the question of should we tell Johnson & Johnson or not. They were comfortable that we did not need to disclose it prior to the time that we did --
THE COURT: Do you recall having this conversation at or around the time that you received this market?
THE WITNESS: I can't say for sure that I did, your Honor, but my understanding was we were not in default when we signed it, and there was no necessary agreement that we would ever be in default under that. We've always had the choice of not -- if we thought we had to disclose to Johnson & Johnson, we could tell Boston and Abbott that we weren't going to proceed with them unless they allowed it, but we weren't going to be forced into a breach. We were not agreeing that we were going to breach the agreement.
THE COURT: All right. I'm just asking, do you recall having conversation about these proposed changes?
THE WITNESS: I had a conversation, your Honor, about these proposed changes.
THE COURT: With whom?
THE WITNESS: I don't remember anymore, but I was comfortable that we were all right.

BY MR. WEINBERGER:
Q. Mr. Kury, you did, in fact, address the issue of whether you discussed this with Skadden in your trial affidavit, didn't you?
A. I think what I said was -- We're now dealing with the addendum to the confidentiality agreement, is that what we're talking about?
Q. Yes, sir.
A. I think what I said, I do not recall whether I did or did not have any questions at that time. I am comfortable that eventually I asked Mr. Mulaney, after Abbott had been disclosed, whether we needed to disclose Abbott to Johnson & Johnson and being told that we did not, at least at that time.
Q. Right.
THE COURT: After Abbott had been disclosed to whom?
THE WITNESS: To us.
THE COURT: To you?
THE WITNESS: Yes.
THE COURT: In other words, before January 8th or 9th?
THE WITNESS: Yes, I think, your Honor, the accession agreement or this provision in the confi agreement was sometime in mid-December and then several days later we found out -- this was before we knew it was Abbott and --
THE COURT: So this draft, you didn't yet know it was Abbott?

THE WITNESS: That's right.

THE COURT: But you recall having these conversations with someone at Skadden, but you can't recall who?

THE WITNESS: I recall -- I don't recall that I had a question specifically at the time we were negotiating signing the agreement. What I do recall is subsequently, when Abbott's name came up and we knew it was Abbott, I am confident I talked to Mr. Mulaney and said, do we have to do anything about it? And the answer was, disclosure was not required.

BY MR. WEINBERGER:

Q. No, but if he had told you it was required, you'd already agreed you couldn't do it, didn't you?

A. We had a choice. We could have gone and gotten their consent, or we could have walked away. We didn't have to proceed with Boston, and we weren't -- we didn't want to be in a position of being in default with Johnson & Johnson.

Q. That's what you would have had to do. In other words, if Mr. Mulaney told you that you had to advise J&J of Abbott's involvement, you'd already agreed with Boston Scientific that you wouldn't do it, you would have just walked away from the deal, right?

A. We had no intention or expectation that we would be violating the agreement with Johnson & Johnson, either because we would not have a legal disclosure obligation under our agreement, or if we thought we needed a legal -- we had a legal

obligation to disclose, we could have gone to them and said, you have to consent to this or we can't do the deal with you.
Q. But just to be clear about the judge's question, you don't recall any specific conversation with Skadden at the time you signed this agreement as to whether or not it was appropriate for Guidant to sign the agreement that prohibited Guidant from disclosing the name of any third-party divestiture candidate?
A. I do not recall whether I had any questions, but if I did, I would have raised them and I would not have proceeded unless I was satisfied.
THE COURT: But then you later had a conversation, after Abbott was identified --
THE WITNESS: Well, that --
THE COURT: -- with Mulaney?
THE WITNESS: Excuse me for interrupting, but at that time, we then had a concrete problem -- I mean, a question that when we signed the addendum, we didn't know there was going to be, for sure, any financing source or competitive -- or a non -- divestiture buyer, and it was an abstract agreement. Now, we had a particular person involved. The question, okay, now we know it is Abbott and they're going to be a divestiture buyer and also a financing source, what do we do? And I was told we don't have to disclose yet.
BY MR. WEINBERGER:
Q. Okay. And that advice never changed, did it?

A. That's right.
Q. There never came a time when he told you you had to disclose Abbott's identity?
A. That is correct. At least until they signed the -- what do they call it, the transaction agreement on January 8th.
Q. No secret by then, was it?
A. That's right.
Q. Now, you say in your affidavit that you took steps to ensure that Guidant complied with its obligation under 4.02(A) to make sure that J&J -- it's actually 4.02(C) -- to make sure that J&J had already had provided substantially concurrent any information provided to a competing bidder. Actually, it's in
A. You said you did that, right?
A. Yes, I did.
Q. You were aware of this obligation, and you took steps to ensure that Guidant complied with it, right?
A. Yes, yes.
Q. In your affidavit you point to a letter that Skadden sent on December 17th enclosing some CDs. If you want to look at it, it's Defendant's Exhibit 179. And you said, these materials have been provided to Boston Scientific in connection with their diligence review; is that right?
A. That's correct.
Q. And that was before any diligence was given to Abbott; isn't that right?

A. What's the date of the letter, counsel?
Q. December 17th.
A. Yes, that would have been before.
Q. And then you cite as another example of Guidant's compliance that on December 20th, you received a call from Messers Deyo and Hilton reminding you of Guidant's obligation to give J&J information that Guidant gave to Boston Scientific; do you remember that?
A. Yes.
Q. And, in particular, they mentioned information about drug-eluting stents and the drug that Guidant used on its drug-eluting stents, which was called Everolimus; is that right?
A. Yes.
Q. And that's because J&J hadn't previously received that information; isn't that right?
A. Yes.
Q. Now, DES --
A. But the date of that, counselor, was what?
Q. I'm sorry, sir?
A. What was the date of that?
Q. December 20th.
A. I don't think anything had been provided yet to Abbott.
Q. And the DES -- Okay. I'll get there. The DES information that they asked you about was, in fact, given to Abbott within

days of that telephone call, wasn't it?
A. You mean after the 20th?
Q. After the phone call on the 20th, within days of that phone call, the DES and Everolimus information that they asked you about was, in fact, given to Abbott, wasn't it?
A. I think that's correct.
Q. And on December 30th, Skadden sent Kravath materials that were provided to Boston Scientific or their advisers in connection with the diligence review via John Exhibit 31, which you can look at; isn't that right?
A. Yes, yes.
Q. And those were the very DES materials that Messrs. Deyo and Hilton had asked about, weren't they?
A. Well, at least some of them were, yes.
Q. And what you told Kravath was that those DES materials had been provided to Boston Scientific or their advisers in connection with their diligence review; is that right?
A. Yes.
Q. Abbott wasn't an adviser, was it?
A. Your question, sir, was what? Was Kravath an adviser?
Q. No. Abbott was not an adviser, was it?
A. I think we were furnishing it to them on the basis that they were a representative.

THE COURT: Call up the exhibit.

MR. WEINBERGER: Sorry, your Honor?

THE COURT: Pull up the exhibit. What about --
Q. 31, John Exhibit 31. I didn't mean you, Mr. Kury. I meant Skadden. Skadden told Kravath that these materials were provided to Boston Scientific or their advisers in connection with their diligence review; isn't that right?
A. That's the word they used.
Q. And Abbott was not an adviser?
A. I didn't focus on that wording at the time. That was a copy of something that was sent to me after it had been sent out and been prepared by Skadden. I did not read that and think that there was anything unusual. I just didn't focus on parsing out the words there.
Q. Do you think it might have been important for J&J to know that you were providing this material to Abbott?
A. My advice from Skadden was that we did not have to advise Johnson & Johnson at that time.
Q. Well, your advice from Skadden was you didn't have to advise Johnson & Johnson that Abbott was involved, right?
A. Right.
Q. But they didn't -- but that doesn't mean you could tell them that you're providing something to Boston Scientific and its advisers when, in fact, you were providing it to Abbott; isn't that right?
A. This letter was drafted by Skadden. I didn't focus on that language. I was comfortable that Skadden was on board, had

approved that we could do what we did, provide information to Abbott and without disclosure at that time to Johnson & Johnson.
Q. In fact, these documents not only were provided to Abbott, they weren't provided to Boston Scientific; isn't that correct?
A. I don't know that.
Q. Well, let's take a look at exhibits --
A. Maybe you're right. I just don't know that.
Q. Take a look at Stoll Exhibit 24. Do you see Mr. John say, here is the binder of material from Abbott's DES due diligence in Santa Clara last week? Do you see that?
A. Yes.
Q. Now, on the following page there's a table that says: Due diligence -- DES due diligence performed by Abbott, December 27th, 2005?
A. Yes.
Q. Do you see that?
A. Yes, I do, sir.
Q. And do you see the fourth line of the table says: Documents shared with Abbott?
A. Yes.
Q. And then the asterisks says: All documents provided to Abbott were also sent to Kravath; do you see that?
A. Yes.
Q. These are the materials that were sent to Kravath with a

letter that's been marked as John Exhibit 31, weren't they?
A. I've never -- I don't think I've ever seen this before, but that's what it seems to be.
Q. Is it a coincidence, Mr. Kury, that that letter said that the materials had been provided to Boston Scientific and its advisers, and the accession agreement falsely characterized Abbott as an adviser of Boston Scientific? Is that a coincidence, sir?
A. So far as I'm concerned, yes. I did not think about it at the time. I did not parse out the language of the transmittal letter. I was relying on Skadden for that kind of thing.
THE COURT: Are you sure you had a conversation about representative being the basis on which these documents were going to be provided to Abbott --
THE WITNESS: I am confident --
THE COURT: -- prior to these letters?
THE WITNESS: I'm confident, your Honor, that my understanding was that Abbott was a representative, was being treated as a representative.
THE COURT: Notwithstanding the fact that the accession agreement refers to them as an adviser, and a document sent by Skadden to J&J makes a reference to Boston Scientific and its advisers concerning documents that were provided to Abbott?
THE WITNESS: My understanding was, your Honor, that

Skadden believed that Abbott was a representative. I did not parse out the language of the transmittal letter. That was all prepared by Skadden. So far as I know, Skadden was not relying on a characterization of Abbott as an adviser.

THE COURT: Well, I've got two contemporaneous documents that use the term adviser. Are you aware of any contemporaneous documents use the word representative when describing Abbott?

THE WITNESS: I'm not aware of that, your Honor.

BY MR. WEINBERGER:

Q. Now, on December 31, the day after Mr. John's letter, you sent an e-mail to Mr. Deyo, copying Mr. Hilton and Mr. Kravath, to update them on the status of your discussions with Boston Scientific; is that right? And that is Kury Exhibit 36. You can look at that. Mr. Townsend. I'm sorry. I said Mr. Kravath. I don't think he's around anymore. Mr. Townsend.

A. Yes, I see that.

Q. Okay. And do you see the e-mail in front of you?

A. Yes, I do.

Q. And you said, "I want to briefly update you on the status of our discussions with Boston Scientific. We are continuing to provide them with information regarding Guidant, as permitted by our November 14th merger agreement." Do you see that?

A. Yes, I do.

Q. And you never told them that you were giving DES and Everolimus documents to Abbott, did you?
A. No, I did not.
Q. And if you had done that, you would have violated the agreement you made when you signed the addendum; isn't that right?
A. I suppose so, but I was -- I was relying on what Skadden -- for this kind of thing. They provided me with this letter. I sent it over my signature, but that was the way they thought it was appropriate to notify Johnson & Johnson. And I guess I've said several times, I thought that they were -- when they were giving me this, that they thought this was appropriate and satisfactory and not in violation of the Johnson & Johnson agreement.
Q. This isn't an a letter. This is an e-mail?
A. An e-mail.
Q. And you who this e-mail, didn't you?
A. It certainly went out on my machine. I don't think I drafted that, in the first instance. I would be surprised if I did, but I can't recall specifically. This is the kind of thing I normally would have had Skadden prepare for me.
Q. Okay. Are you aware of any draft of this e-mail that was sent to you by Skadden?
A. I don't remember here, counsel.
Q. Now, do you recall that during the analyst's call

announcing the Boston Scientific definitive offer on January 9th, Larry Best disclosed that due diligence had been given to Abbott? Do you recall that?
A. I do.
Q. And you received a call from Messers. Deyo and Hilton about that, didn't you?
A. I did.
Q. I'm going to ask you about the details of the call later, but for now, isn't it correct that after that disclosure, after that call, you provided J&J with additional due diligence materials that had been provided to Boston Scientific and Abbott, but which had not previously been given to them?
A. I think that's right. I think I got this phone call. I understood they were asking whether they had all the documents. I think I sent something out immediately to Skadden. I think I got a reply a few minutes from Neal saying that they already have all the DES documents, and then there was something from, I think, Alison, perhaps, where she said, yes, they do have all of those documents. And there are a couple of other things we're getting together, and we'll get them over to them tomorrow.
Q. So you provided, as I asked you, additional documents?
A. Yes, we did.
Q. All right. Now, I'd like you to --
MR. WEINBERGER: What time, your Honor, do you want us

to break?

THE COURT: I was thinking 4:00, but we can stop now if you want.

MR. WEINBERGER: This happens to be a good spot.

THE COURT: Okay. Let's take a short afternoon break, and we'll pick up in about a ten minutes. We'll pick up at 4:00 sharp. Okay?

(Recess)

THE COURT: All right. Let's proceed.

BY MR. WEINBERGER:

Q. Mr. Kury, I'm going to direct your attention to section 4.02(B) of the merger agreement, that's Kury Exhibit 9, at the page that's Bates numbered 26227. And there are provisions in there about what agreements you can and cannot make, and I don't want to get into a discussion about them. I just want to know if you are familiar with them?

A. Just point me to a paragraph.

Q. It's 4.02(B).

A. Yes, I have a Page 38 in front of me.

Q. That's it, going off to --

THE COURT: At the bottom of the page?

Q. At the bottom of the page, going off to the next page?

THE COURT: Can you read it?

THE WITNESS: Oh, yes. Yes.

THE COURT: You can read that?

THE WITNESS: Well, I'm skimming through it.
A. Harold, can you tell me what you want?
Q. I just want to know if you're familiar with the provisions at the very bottom dealing with the prohibitions against the executing or entering into certain agreements?
A. This is at the end of paragraph B?
Q. Yes. Bottom of the page.
A. Well, for me, it's the top of Page 39.
Q. Correct.
A. Is it the "Provided however"? I'm still having trouble finding the particular topic.
Q. Okay, so go -- you'll see, "Neither the board of directors nor the company" --
A. Excuse me, which line are you starting with?
Q. Starting at subsection B.
A. Okay.
Q. "Neither the board of directors of the company nor any committee thereof shall," and then just go to little two, four lines up from the bottom, "adopt or recommend or publicly propose to adopt or recommend or allow the company or any of its subsidiaries to execute or enter into any letter of intent, memorandum of understanding, agreement in principle, merger agreement, acquisition agreement, option, joint venture agreement, partnership agreement, or other similar contract constituting or relating to, or that is intended to, or could

reasonably be expected to lead to any takeover proposal, other than the confidentiality agreement referred to in section 4.02(A), the acquisition agreement."

That's the provision I'm referring to. I just want to know if you're familiar with it?

A. I undoubtedly read it. Until you brought it up just now, I hadn't read it in a long time.

Q. Okay. What I'm seeing here is that "I undoubtedly read it. Until you brought it up just now"?

A. I undoubtedly read it back at the time, but I hadn't thought about it in nine years, I guess.

Q. Okay. Are you aware that a joint defense agreement, written joint defense agreement was entered into by Abbott, Boston Scientific and Guidant in February of 2006?

A. I believe I remember that.

Q. Or that --

A. Or at least it's come up in connection with the documents I see.

Q. Okay. Could you look at Kury Exhibit 34. Actually entered into by the parties and a whole bunch of lawyers for the parties, and if you look at Page 18422, if you could confirm for me that you signed that agreement on behalf of Guidant?

A. I'm just waiting for the signature page to come up.

Q. Signature page is at --

A. It just hasn't come up yet. Okay, now. It has my

signature line there, but I don't see the signature, but presumably I did sign.
Q. Okay. Mr. Kury, if you look at the page that's Bates numbered 48122, I think you'll see your signature.
A. I see it, yes.
Q. Okay. And do you recall that this agreement referred to a -- on the second page of the agreement it says, "Whereas, the clients and their outside counsel wish to memorialize their preexisting oral defense agreement;" do you see that?
A. Yes.
Q. And were you aware that Guidant entered into an oral joint defense agreement with Boston in December of 2005?
A. I don't think I knew or didn't know. I just have no -- don't recall enough knowledge of that.
Q. Were you aware that Abbott also became a party to that agreement sometime --
A. What --
Q. Just let me finish the question. Sometime after December 20th?
A. I wasn't aware of that.
Q. Am I correct that you have no recollection of any specific advice of counsel that any such oral defense agreement was consistent with the J&J/Guidant merger agreement?
A. No, I think I relied totally on Skadden for this. This was purely an antitrust document.

Q. Well, whatever it was, you don't recall any specific advice saying it's okay for us to do this?
A. I don't recall that, you're right.
Q. Now, in early January, did you receive a call from Russ Deyo inquiring about draft merger agreement between Boston Scientific and Guidant?
A. I think that's right. I think so.
Q. Oh, sorry. Could you look at Stoll Exhibit 19. Do you see the e-mail on the bottom?
A. Yes.
Q. There's an e-mail from you to Mr. Deyo and Mr. Hilton?
A. Yes.
Q. And in the last sentence it says: As to your question regarding --
THE COURT: "As for your question," right?
Q. "As for your question regarding 5.03, I suggest that you have one of your lawyers give Neal Stoll or Ian John a call. They will describe what our understanding of what Boston Scientific is seeking re: retaining our rights to the VI business." Do you see that?
A. I see that.
Q. And do you recall in that telephone call that you received from Mr. Deyo and Mr. Hilton in early January, they asked you what rights Abbott -- Boston Scientific, I'm sorry, was trying to retain in connection with its planned divestiture of the VI

and ES assets to Abbott or to anybody?
A. I don't remember that.
Q. You did in this e-mail, however, tell them to call Neal Stoll and Ian John, correct?
A. Yes.
Q. You told them to have their attorneys call, right?
A. Yes.
Q. And in the e-mail above, Mr. John told you there's this problem, the only information that Mr. Stoll and I know about these potential divestiture transactions had been learned in privileged conversations; do you see that?
A. Yes, I see that.
Q. And he was, obviously, referring to information he got from Boston Scientific and Abbott, wasn't he?
A. I don't know.
Q. Well --
A. I don't know what he --
Q. Guidant didn't know --
THE COURT: Let him finish the answer. "I don't know," what did you say?
THE WITNESS: I just don't recall anything on this.
BY MR. WEINBERGER:
Q. Okay. But it's pretty clear that Mr. John here is talking about information he learned in discussions with Boston Scientific and Abbott about what they were negotiating for, in

terms of retained rights in the VI and ES business; isn't that right?
A. I just -- I don't remember anything about it. I can only read it now, but I don't recall anything from that time.
Q. And you don't know if Mr. John's reference to a privileged conversation is related to conversations pursuant to the oral joint defense agreement, do you?
A. I don't know that.
Q. So you instructed Mr. John to talk to Mr. Mulaney about this, didn't you? You said: "Please discuss with Chip, and give me your recommendation," right?
A. Yes.
Q. And then Mr. John sent you an e-mail back saying: Bernie, if called, we would plan to say that we know nothing more specific about Boston's demands in this area than has been shared publicly. That is, that Boston wants shared rights to Guidant's DES program. We have not learned any details about what that means, right?
A. That's what it says.
Q. And you were comfortable with Mr. John giving that answer to J&J?
A. I apparently was, but again, I am drawing virtually a complete blank on this exchange of e-mails.
Q. And, in fact, J&J's lawyers did call Mr. Stoll, didn't they?

A. I don't know that.
Q. Would you turn to Harris Exhibit 12. Do you see this is an e-mail sent by Mr. John to you on Friday, January 6th?
A. I see that, yes.
Q. And that's the day after Mr. John told you if we get a call from J&J, we're going to tell them we don't know anything more specific about Boston's demands in this area than has been shared publicly, right?
A. That's what it said, yes.
Q. And then they received a call from Jim Hilton and Eric Harris, according to this e-mail sent to you, right?
A. Yes.
Q. And Mr. Stoll told J&J that they hadn't seen Abbott's proposal; is that right?
A. I only know what I read here.
Q. And according to this e-mail, Mr. Stoll didn't tell J&J that Guidant, Abbott and Boston had entered into an oral defense agreement in December, pursuant to which Guidant had received privileged information about Boston Scientific's divestiture plans, did they?
A. Not that I know of.
Q. By the way, in that same call, Mr. Hilton apparently hypothesized that Apple or Abbott was the potential divestiture partner; is that what it indicated here?
A. Yes.

Q. And Mr. Stoll neither confirmed nor denied that; isn't that right?
A. That's what it says.
Q. In the same call, isn't it true that Mr. Stoll told Mr. Harris and Mr. Hilton that there had been no discussion with Abbott -- I'm sorry, no discussion with Boston Scientific about divesting the co-promotion agreement?
A. That's what it says.
Q. And that was just not true, was it?
A. I don't recall focusing on that or thinking about it.
Q. You knew that wasn't true, didn't you?
A. I do not recall seeing that or focusing on it or worrying on it. I was relying on Mr. Stoll to handle this appropriately. I didn't -- I didn't spend any time analyzing this.
Q. Actually, they asked whether there was any discussion about divesting to co-promote not just with Boston Scientific. We just went through a series of documents indicating that you knew full well that Abbott was inquiring about the transferability of the co-promotion agreement, didn't we?
A. We did.
Q. And you knew when you got this e-mail, that what Mr. Stoll told Johnson & Johnson about the co-promote was untrue, didn't you?
A. I didn't know that. I don't remember thinking about it

that way. Whether I might have had knowledge, which if I had linked it all up, I might have reached that conclusion, I don't know, but that's not the way I thought of it. I didn't come away from this with any sense that Mr. Stoll had been improperly withholding information.

Q. Well, that's pretty apparent from this e-mail, isn't it? On several counts, isn't it?

A. What -- what I --

THE COURT: I don't understand the question. What's pretty apparent?

MR. WEINBERGER: I withdraw the question.

Q. Are you aware that Guidant forwarded confidential Guidant materials to the FTC in connection with Boston Scientific's proposal prior to terminating the Johnson & Johnson/Guidant merger agreement?

A. I am aware of that.

Q. In fact, you were asked by Skadden to authorize the sending of a letter to the FTC, allowing the FTC to share that information with foreign antitrust authorities prior to the termination of Guidant's agreement with Johnson & Johnson; isn't that right?

A. I don't remember that, but I don't doubt it.

Q. Well, why don't you look at John Exhibit 41. Do you see John Exhibit 41, the bottom e-mail is an e-mail from Mr. John to you dated January 20th, 2006?

A. I see it, and I'm trying to read it hurriedly, counsel.
Q. Take your time, Mr. Kury. Just let me know when you're ready.
A. I've skimmed it hurriedly, but I get the idea of it.
Q. Okay. And do you recall now that you were asked to authorize Skadden, essentially, to tell the FTC that they could share this information with foreign regulatory authorities?
A. Well, it seems pretty clear that I was. Whether I independently recalled it, I don't know, but I don't --
THE COURT: Well, do you?
THE WITNESS: I don't deny that, the accuracy of this letter. I apparently got it, and I eventually said: Please proceed; so I responded.
THE COURT: Well, several questions. Do you have any recollection of this correspondence as you sit here today?
THE WITNESS: I don't think I've seen these e-mails since I received them, whenever it was, nine years ago, I think. Somewhere in the course of the various preparations we've had for this proceeding, at some point I learned or refreshed that there was a furnishing of documents to the FTC.
BY MR. WEINBERGER:
Q. Okay. And there's no doubt that that's your e-mail up at the top that says "please proceed"?
A. No, I'm not quarreling with that.
Q. Okay. And is it correct that you have no recollection of

receiving specific advice that Guidant could provide information to the FTC relating to a potential transaction with Boston Scientific prior to terminating the J&J/Guidant agreement?

A. That's correct.

Q. That's not a good question. Let me rephrase it.

Prior to terminating the J&J Guidant agreement -- withdrawn.

Is it correct that you have no recollection of receiving specific advice that, prior to terminating the J&J/Guidant agreement you, Guidant, could provide information to the FTC?

A. That is right. I do not recall any specific advice on the subject.

Q. And Boston Scientific made its definitive offer on January 8th, 2006, correct?

A. Yes.

Q. And it sent a bid letter, Boston Scientific chairman Nicholas sent a letter to Guidant chairman Cornelius with a proposed merger agreement between Boston Scientific and Guidant on that date, didn't it?

A. Yes.

Q. And if you look at Kury Exhibit 38, if you could identify that?

THE COURT: Kury 38?

MR. WEINBERGER: Kury Exhibit 38.
Q. It's the last document in the first binder. Okay. And is this the e-mail transmitting the definitive offer and the proposed agreement plan of merger?
A. Yes.
Q. And this offer did not include the transaction agreement between Abbott and Boston Scientific, did it?
A. Not that I know of.
Q. He's not saying to you, attached is our joint bid on behalf of Boston Scientific and Abbott?
A. No, it didn't say that.
Q. All right. And when the transaction agreement was sent to you, it was under cover of a statement that said it was solely to facilitate your review of Boston Scientific's offer; isn't that correct?
And you can look at Kury Exhibit 39. It's the first document in the next binder.
A. When it comes up, I will.
Q. So just to be clear, the bottom e-mail is from Shearman lawyers to some Skadden lawyers, and then it was forwarded to you by Alison Rhoten; is that correct?
A. Yes.
Q. And in the e-mail, Shearman and Sterling said to Skadden: Attached is a copy of the transaction agreement referred to in the merger agreement that we have sent to you as part of Boston

Scientific's definitive offer for Guidant. We are sending the attached transaction agreement to you solely to facilitate your review of Boston Scientific's offer. Do you see that?
A. Yes.
Q. In accordance with the terms of the confidentiality agreement between Boston Scientific and Guidant, we expect that you will not share the attached with any other person. Right?
A. That's correct.
Q. So it's clear that Boston Scientific did not regard its agreement with Abbott as part of its offer for Guidant; isn't that correct, sir?
A. I don't know.
Q. Well, that's what it says, doesn't it?
A. The first sentence says: This is the agreement referred to in the definitive offer.
Q. Mr. Kury, if this agreement was part of Boston Scientific's offer, it would have to be provided to Johnson & Johnson, wouldn't it?
A. I don't recall independently. On anything like this, I would have relied on Skadden to tell me what to do.
Q. Well, in your affidavit, you said that you were told not to share this with anyone; isn't that right? And that's what it says here?
A. That's what it says there. This wasn't sent to me.
Q. And that's what it says in your affidavit, that you were

told you should not share that with anyone else; isn't that right?
A. Well, I think the e-mail that you're referring to actually went to Skadden. I'm not even copied on it, but in effect, the Guidant team was being told that, if they were telling Skadden.
Q. You gave this to J&J over Boston Scientific's objection, didn't you?
A. I understand that we did, yes.
Q. Now, on January 9th, the day after Boston Scientific announced the definitive offer, I think you've already acknowledged that you received a phone call from Mr. Deyo and Mr. Hilton; is that right?
A. That's correct.
Q. And I think I understand your testimony in your affidavit that the only part of that call that you remember is that Mr. Deyo asked to receive the same materials that you had provided to Abbott in connection with the due diligence that they learned about on the conference call with -- analyst's call from Mr. Best; is that right?
A. That's correct.
Q. And you have no recollection of Mr. Deyo raising the issue of breach; is that right?
A. That's my recollection.
Q. And you have no recollection of promising to get back to Mr. Deyo; is that correct?

A. That's correct.
Q. But if Mr. Deyo and Mr. Hilton have testified under oath that they did say that, you would not deny it, would you?
A. I can only tell you that I do not recall that. I've said that consistently. I don't know whether they did or did not, except I do not recall that. It is possible that they thought they were conveying that to me, but that's not the message I took away.
Q. Okay.
A. If I had had that message, I can assure you I would have been on the phone with Mr. Mulaney in five minutes.
Q. This is a question of your recollection; is it not? You just don't recall it?
A. Do I recall that --
Q. I'm sorry. You just don't recall; is that right?
A. I do not recall. I think I said something in my reply eventually, I don't recall that conversation that you referred to the way you do.
Q. But you're not suggesting they're lying, are you?
A. Not necessarily, no.
Q. Now --
A. And I hope they're not suggesting I'm lying.
Q. I'm sorry?
A. I hope they're not suggesting I'm lying. I've giving you my best recollection. I've had that consistently since the

first time this was raised, including back in January when we drafted the response to their letter of January 23. The thing we did was say, I do not recall the conversation as you did.

THE COURT: Well, I'm very open to the possibility that someone is lying, just so it's clear.

BY MR. WEINBERGER:

Q. Isn't it a fact, sir, that before you received any other communication from J&J on that subject, you knew that J&J was asserting a breach by Guidant of the merger agreement?

A. No, which -- What are you referring to?

Q. I'm just asking you.

A. Did I know --

Q. Let me rephrase the question. You received a letter from Mr. Deyo on the 23rd of January?

A. Yes.

Q. Before that letter, you were fully aware that J&J had a claim for breach of the merger agreement, didn't you?

A. I don't know what you're referring to.

Q. Why don't you look at Kury Exhibit 74. Is this an e-mail chain between -- withdrawn.

Let's look at the bottom e-mail first. That's an e-mail from Mr. Deyo to you dated January 17th, 2006. Do you see that?

A. Yes.

Q. And Mr. Deyo is sending to you a press release that Johnson

& Johnson is planning to put out in response to the $80-a-share offer that Guidant -- that Boston Scientific had announced that day; isn't that right?
A. That's right.
Q. And then there's an e-mail in which you're forwarding that press release to Mr. Cornelius and a bunch of other people at Guidant; is that right?
A. That's correct.
Q. And one of those people is Doug Hughes; is that right?
A. That is correct.
Q. And is he someone or was he someone in the PR department at Guidant?
A. Something of that kind.
Q. And then Mr. Hughes writes back to you: What are their options under the merger agreement, other than increase their bid or walk? Do you see that?
A. I do.
Q. And your response was: Claim we breached. Do you see that, sir?
A. Absolutely.
Q. Now, on January 23rd, you received a letter from Mr. Deyo; is that right?
A. That's correct.
Q. And in your affidavit you say that the letters imply that Guidant's provision of due diligence information to Abbott was

a violation of section 4.02; do you see that?
A. I do.
Q. But you, in fact, understood full well that Mr. Deyo was asserting that J&J believed there had been a breach. It's not just an inference on your part; isn't that right?
A. No, no, I don't think that's right. On reading over the letter of the 23rd, I mean, I see that he never specifically says we're in breach. He expresses some feeling of being troubled and perplexed, and basically was saying I would like you to provide a rationale, maybe sub-clause, and if you don't, maybe you're in breach.
But, yeah, something like -- but he was -- so in my latest affidavit, I said he was implying there may be a breach, but he never actually used those words. It was not a classic demand, breach letter saying, you are in breach. He asks, as he's troubled and perplexed, and asks for our rationale.
THE COURT: Kury 74, do you have that in front of you?
THE WITNESS: No.
THE COURT: Pull that up.
THE WITNESS: If you're referring, your Honor, to "Claim we"?
THE COURT: "Claim we breached," right. So what was your basis for saying that they might claim we breached, just what's attached here?
THE WITNESS: No.

THE COURT: Or other conversations?

THE WITNESS: No, my -- the intent of that e-mail was not to tell Mr. Hughes that I thought we were in breach. It was not to tell him I thought there was a substantial possibility that we were going to be in breach, or that there was any possibility. It was basically an academic answer to a question.

You're in a merger, takeover situation. There's a bidding contest. One party begins to get outbid, and they say they're going to consider their options. Somebody says to me, what can they do? Can they raise? Is there anything else? I said, well, they can raise, they can fold, or they can try to find some claim of breach.

And I think it's pretty well understood that, in this kind of context, litigation is often ginned up by a disgruntled party. I could not absolutely rule out the possibility that they could come up with anything, but I did not, in writing that, have in my head there was a conversation with Mr. Deyo on the 9th and that's what I'm worried about. That was not it at all.

THE COURT: Were there any conversations between the 9th and the 17th in which you had a discussion with anyone --

THE WITNESS: No.

THE COURT: -- about potentially being accused of breaching the J&J merger agreement?

THE WITNESS: No, your Honor.

THE COURT: Not at all?

THE WITNESS: Not at all.

THE COURT: Okay. Go ahead.

BY MR. WEINBERGER:

Q. Mr. Kury, your testimony is this e-mail and this statement that you made, had nothing to do with the phone call on January 9th?

A. Yes, sir.

Q. Now, I think you -- where I was a minute ago was you answered my question about how you understood Mr. Deyo's letter of the 23rd. And I'd like you to look at your deposition at Page 275.

A. All right.

Q. Okay. And I'd like to start on Line 11, 275.

"I'd like to show you what's been marked as Exhibit 50. Exhibit 50 is the letter to which you are responding in Exhibit 51; is that correct?

"A. Yes.

"Q. And in that letter, he asked you to get back to him with Guidant's view on how -- the end of the letter, Guidant's view on how this disclosure could possibly have been consistent with the terms of the no-solicitation clause of the agreement. Do you see that?

"A. Yes.

"Q. And you understood him to be alleging that he believed that he -- that he believed, based on the facts that he was asserting in this letter, that there was a breach of the agreement, didn't you?
"A. No. I didn't infer that he believed it. I understood that he was saying it.
"Q. Fine. Okay. You understood that he was communicating to you --
"A. Yes.
"Q. Just let me --
"A. He was asserting.
"Q. But you understood that he was asserting that there had been, and based on the facts as he understood them, there had been a breach of that agreement; is that right?
"A. I think so, yes."

Did you give me that testimony, sir?
A. I did.
Q. And you responded to Mr. Deyo's letter, did you not?
A. I did.
Q. And if you turn to Exhibit 51, I think you'll find your response.

THE COURT: What exhibit?
Q. Kury Exhibit 51. And am I correct that this is the response that you sent to Mr. Deyo, to his letter of January 23rd?

A. Yes.
Q. And this response was drafted for you by Skadden; is that right?
A. That is correct.
Q. And it represented Mr. Mulaney's advice to you?
A. Yes.
Q. And you accepted it virtually unchanged; is that right?
A. That is correct.
Q. Now, I'd just like to ask you about some of the statements in here. In one of the responses that you made, the third paragraph, the last sentence you said: "In addition, a takeover proposal may be made by one person or a number of joint bidders;" do you see that?
A. I do.
Q. This was not the implicit or explicit advice that Skadden gave you before diligence was provided to Abbott, was it?
A. No, it was not.
Q. So this is just an after-the-fact rationale; isn't that correct?
A. I'm not sure exactly what it was, counselor. I viewed it as being a kind of -- I viewed the first part of this as being the essential rationale which was, in effect, that Abbott was a representative. I viewed this last sentence as something that was essentially to reflect that, thrown in or by the way. It was something that I had not focused on before, and it was not

the basis from which I thought we had been proceeding for the last several months.

Q. We'll get to the representative issue. My question for right now is, this was an after-the-fact rationale; isn't that correct?

A. It was -- I don't know whether it was after the fact exactly, but it wasn't something that I'd been thinking about. It was not something that was in my mind and, therefore, when it came in there, I went, hmm, what is that all about?

Q. Are you saying in this letter that Abbott did make a takeover proposal, or just that it could have made a takeover proposal?

A. I don't know that it says either. It says, in addition, a takeover proposal may be made by one person or a number of joint bidders. Now --

Q. What would be the point of saying this in the letter if you weren't saying either that a takeover proposal had been made or could have been made?

A. I can only -- I don't really have the rationale for -- I don't remember having clear understanding of what Chip was talking about there, and that was not what I was relying on. As far as I was concerned, they were a representative and that was the basis of my proceeding in the past, and I didn't have -- I didn't trouble myself too much about that last sentence.

THE COURT: Why -- did you use the word "representative" in this letter?

THE WITNESS: No, the word "representative" is not used there, your Honor, but that was my clear understanding of what they were talking about.

THE COURT: Well, his letter to you, Deyo's letter to you, asked you to provide the rationale for providing this information to Abbott, correct?

THE WITNESS: That is correct.

THE COURT: And so was your letter response endeavoring to provide the rationale?

THE WITNESS: I think it was, yes.

THE COURT: So why didn't you just articulate what the rationale was? Which was, that they were a representative, as that term is to broadly defined in the merger agreement?

THE WITNESS: I don't understand, your Honor. I don't remember saying to Chip, why don't you just say "representative" or not. This came in, it was a last minute thing, the deadline was expiring the next day. I asked Chip to respond to this. He put this together. I read it over. I may have had a conversation or two with him, and I sent it out.

But I didn't -- I didn't -- I don't even know, or I noticed at the time he wasn't saying representative, I just don't remember that. So I have no particular knowledge as to why he didn't specifically say, this Abbott is a representative. But I think the first couple of sentences there are of that general tenor.

(Continued on next page)

THE COURT: Go ahead.
BY MR. WEINBERGER:
Q. Let's just stay with this sentence. Is it your view as you sit here now that Abbott made a takeover proposal by itself or with Boston Scientific?
A. No.
THE COURT: So you're not saying that they were a financial advisor and you're not saying they were a joint bidder?
THE WITNESS: No, his question was: Did I view them as a joint bidder. My only answer was I didn't view them as a bidder or joint bidder.
THE COURT: Right. And previously we talked today about whether or not they were a financial advisor to Boston Scientific.
THE WITNESS: No, your Honor.
THE COURT: You didn't consider them to be that either, right?
THE WITNESS: You're correct, not a financial advisor.
THE COURT: So you considered them to be a representative as that term is broadly defined?
THE WITNESS: Yes, sir.
THE COURT: But there is nothing in this letter that uses that term?
THE WITNESS: That is correct.

THE COURT: OK. Next question.

BY MR. WEINBERGER:

Q. Just to be clear, you agree with me that there was no proposal made by Abbott that was passed on by the Guidant board. Is that right?

A. That is correct.

Q. And that the board made no determination with respect to Abbott even as of January 8, the date that this offer --

A. That is correct.

Q. Now, I am going to come back to this, but I would like you to look at Kury Exhibit 57. This is an email that you sent to Mr. Mulaney, is it not?

A. It is.

Q. And to Mr. Duwe?

A. It is.

Q. I think it has been established that you got a draft from --

THE COURT: I want to know, when did you get this? Do you remember when you got this?

THE WITNESS: This is an email I sent.

THE COURT: I'm sorry. When did you send this relative to the -- what is Exhibit 51, your response?

THE WITNESS: My best recollection is I sent it before.

THE COURT: When in relation to when you got the draft that Mr. Mulaney had sent you?

THE WITNESS: I'm unclear on that, your Honor. It was either -- it was somewhere around the same time. I don't know whether they crossed. I don't know whether one was a little earlier or a little later.

THE COURT: OK.

Q. There was no reason for you to send this email to him before you got the draft from him, was there?

A. There could have been. I have to speculate here, counselor. I think I got the draft about 8:00 New York time, and I'm fairly confident that I had a conversation with Chip earlier in the evening, and it may well have been that at that time he had given me an outline or ticked off a couple of points he was thinking about making in his letter, so it's possible that the comment about technical analysis may have related back to that or it may also related actually to the draft when I had it in front of me. I don't remember any more.

Q. He sent you a draft, and in the draft he was proposing that you tell Mr. Deyo that takeover proposal could be made by one or more bidders. Is that right?

A. That's right.

Q. And just at around the same time, you sent an email "But, seriously, folks, what is the technical analysis of whether Abbott is a bidder," right?

A. Yes.

Q. There can't be any doubt that you sent this in response to the draft that Mr. Mulaney sent to you, can there?
A. I just gave you two possibilities. I'm not sure which it was. I'm not sure whether it was a response to the specific language or it was something that was occasioned by a prior telephone call that evening where he talked about what he might say. And then I sent off this. I'm not sure which of those possibilities is in fact the case.
Q. Neither Mr. Mulaney nor Mr. Duwe responded to you, did they?
A. There is nothing in writing. I cannot tell you, counselor. I am not sure whether in fact I talked to either of them and had a further discussion of the point.
Q. But you have no recollection of Mr. Mulaney providing you with any technical analysis as you invited him to do in that exhibit, do you?
A. I can only tell you two things: Either I had a conversation before I sent out the response to Mr. Deyo, but I cannot swear to that, or there wasn't anything in writing and I didn't get anything later. So I either went ahead and sent out the response to Mr. Deyo having had perhaps that conversation, but I can't absolutely swear to that. Or having decided that it was not important to me in terms of sending this out because, as I've said earlier, I did not -- I had not been relying on the technicality -- not relying on the status of

Apple -- Abbott as a bidder, and I think what this was meant to do was whatever I sent, at sometime I'll have a little more talk about whether Abbott was a bidder but it wasn't fundamental or really important to my letter because my letter in my mind was basically saying that we were treating Abbott as a representative.

Q. Let me first direct you to your deposition at page 282; beginning at line 5, I would like to know if you gave me the following answers to my questions.

"Q. As you sit here today, you don't know if you ever received any technical analysis from him orally or in writing as to whether Abbott was a bidder. Am I correct?

"A. I cannot specifically -- I know I didn't get anything in writing other than whatever this may represent. I would have assumed he would have called me and we would have talked about it. He wouldn't have ignored me, but I don't remember what the timing was or the detail content of that conversation.

"Q. You don't actually remember if there was a conversation?

"A. No, I do not remember that."

Did you give me that testimony?

A. Yes.

Q. So, you were content to send this response to Mr. Deyo without knowing what the technical analysis was of whether Abbott was a bidder. Is that right?

A. That may have been the case. As I say, I couldn't recall the conversation. I'm not saying there wasn't one, but I must have determined -- if I didn't have that conversation, I felt that it was not necessary before I sent the letter, but if they were, as I thought, a representative, whether they were a bidder, surplusage or something by the way, an additional possibility.

Q. Mr. Kury, in your affidavit you say that the reason you sent this email was that you already knew that Mr. Mulaney's conclusion was that Abbott was entitled to receive due diligence information under the merger agreement as a representative of Boston. Is that right?

A. Yes.

Q. Do you think that follows? Do you think it follows from the fact that you already knew or you claim you already knew that diligence was provided to Abbott as a representative that you would send an email to someone saying, "Seriously, folks, what's the basis for this other statement you're making in this letter?"

A. I'm not sure what they -- that they contradict each other. I was confident that they were a representative. I'd been advised by Skadden on that and that was a sufficient basis by itself, and we didn't need anything else.

Q. And the one thing you didn't put in this letter was that Abbott was a representative. Isn't that right?

A. That's correct.

Q. And the other thing you didn't put in this letter is, "By the way, I got advice from Skadden, Arps this was OK"?
A. That is correct.
Q. Now, if you turn back to Exhibit 51, you say that "nothing in the no-solicitation provisions" -- I'm reading now from the third paragraph four lines up. "Nothing in the no-solicitation provisions prevents a party making a takeover proposal from seeking to finance the takeover proposal in part by divestiture or attempting to address regulatory concerns by arranging in advance for a divestiture."
Do you see that?
A. I do.
Q. That's not the issue that Mr. Deyo was raising, was it?
A. I think that's one of the issues he was raising.
Q. He wasn't claiming, was he, that there was some breach because Boston Scientific had agreed to -- I'm sorry -- Guidant had agreed to a proposal from Boston Scientific that required financing, was he?
A. I'm not sure what you're saying, counselor. This says "nothing in the no-solicitation prevents a party from seeking to finance in part by divestiture or attempting to -- or prevents him from attempting to address regulatory concerns."
Q. Did you understand Mr. Deyo's letter to be saying that J&J believed that the provision of due diligence to Abbott was a breach of the merger agreement between J&J and Guidant. Did

you understand that?
A. That was certainly what he seemed to be at least suggesting, if not outright claiming.
Q. And saying that nothing in the no-solicitation provisions prevents a party making a takeover proposal from seeking to finance the takeover proposal in part by a divestiture or attempting to address regulatory concerns by arranging in advance for a divestiture does not answer that question, does it?
A. I think it does.
Q. Tell me how. How does this answer the question of whether or not Guidant was permitted to give due diligence to Abbott before it terminated the agreement with Johnson & Johnson?
A. Well, Skadden had been of the view that divestiture partners and financing people were included within the term of representatives.
Q. That's the answer then; not this, right? The answer was, the answer should have been if what you are saying is correct is that Skadden, Arps said that divestiture parties and financing sources were representatives, right?
A. Well, that's another way of doing it. I don't know that Mr. Mulaney, apparently didn't feel it was necessary to specifically use that rubric in making this general statement.
Q. Neither of you felt it necessary to tell Mr. Deyo the actual basis on which you claim to have a right to do what he

said was a breach of the merger agreement?
A. I was relying on Mr. Mulaney for advice on this. I looked at it. I didn't parse it out all that carefully in the hour or so I had to review it before I sent it out. I thought it reflected the substance of what we discussed in the past, and I went with it.
Q. Let's go to another rationale you provided. You said, "Abbott is providing financing for Boston Scientific's proposal through a purchase of certain Guidant assets, the acquisition of equity in Boston Scientific and the provision of debt financing." That was a statement of fact. Right?
A. Yes.
Q. Then you went on. "It is perfectly reasonable and appropriate for Boston Scientific's financing sources to have access to due diligence information under an appropriate confidentiality agreement."
Do you see that?
A. Yes.
Q. That's not a statement that it was permitted under the merger agreement, is it?
A. No, it doesn't specifically say that, but I think that is a saying in some -- I think he is suggesting it's a reasonable and appropriate interpretation of the agreement.
Q. It doesn't say that, does it?
A. It does not specifically say that.

Q. Because it may be appropriate and it may be reasonable, but it also may be prohibited by the agreement, right?
A. That is possible.
Q. So this doesn't answer Mr. Deyo's question as to how you could -- how it is that provision of due diligence to Abbott is consistent with the terms of the J&J/Guidant merger agreement, does it?
A. It's possible. It's possible Mr. Deyo was not satisfied, but that did not change what I understood to be our view which was that this was permitted.
Q. But you also say, "Abbott is providing financing for Boston Scientific's proposal through a purchase of certain Guidant assets, the acquisition of equity in Boston Scientific, and the provision of debt financing."
Do you see that?
A. Yes.
Q. And when you made the decision to give due diligence to Abbott, you had no knowledge that Abbott was acquiring equity in Boston Scientific, did you?
A. I don't remember what we knew at that time.
Q. But you had no knowledge that they were providing debt financing, did you?
A. I don't know that.
Q. Well, you were not privy -- Guidant was not privy to the negotiation that was going on between Boston Scientific and

Abbott, were you?
A. Not that I know of.
Q. So this is just another after-the-fact rationale, isn't it?
A. I'm not sure I thought of it that way at the time. This is what I had been presented with by Skadden who had been the advisor on this. I don't remember parsing out as to when I knew and what I knew and when I knew it in terms of whether I knew already that they were providing financing or not.
Q. The following two sentences that we just looked at, on the second page, the second line is another statement that is made "Since Abbott's participation in Boston Scientific's proposal was entirely through the efforts of Boston Scientific and not Guidant, Guidant is in compliance with the no-solicitation provisions of the merger agreement. At no point did Guidant suggest to Boston Scientific that it could facilitate antitrust approval by divesting certain assets to Abbott or that Abbott could facilitate a Boston Scientific proposal."
Do you see that?
A. Yes, I do.
Q. In essence, what you're saying here is that because Guidant didn't solicit Abbott, there is no breach of the provision that Mr. Deyo was referring to. Is that what you're saying here?
A. I think what we were saying is that Boston was our takeover bidder; that we did not consider -- I did not consider anyway that Abbott was the bidder, and we were trying to, I think,

make the point that Abbott had in effect been brought in the deal, had become part of the Boston team, if you will, in part because of the Boston's efforts. They had a deal between Boston and Abbott. It wasn't a deal between Abbott and Guidant. We were looking to Boston as the bidder. They were the ones who we were doing substantive negotiations with. They had a side arrangement with Abbott. They looked to Abbott to help them get this deal done and our only concern was to make sure, as sure as we could, that when they eventually came forward with their definitive deal, we could be comfortable that Boston's bid as it was described was going to be adequately financed, and that there would not be any antitrust problems.

Q. That's why you told them the takeover proposal may be made by one person or a number of joint bidders?

A. I don't remember -- I've said that we did not regard -- I did not regard Abbott as a bidder or a joint bidder.

Q. Let me go back to the sentence I asked you about. The first sentence is, "Since Abbott's participation in Boston Scientific's proposal was entirely through the efforts of Boston Scientific and not Guidant, Guidant is in compliance with the no-solicitation provisions of the merger agreement."

Do you see that?

A. I do.

Q. Is it your testimony, was it your understanding that if

Abbott's participation in Boston Scientific's proposal was not through the efforts of Guidant, that Guidant was in compliance with the no-solicitation provisions of the merger agreement merely by virtue of that fact?

A. There was a lot in your question. Let me think about it. I think what I was thinking was that they were not supposed to go out -- it had been one thing if we'd gotten the offer from Boston, and then we went out and initiated conversations with Abbott and said why don't you come in. We didn't do that. I think we were saying, here, this was Boston proposal. Boston was our bidder, and Abbott had, through the efforts of Boston been putting together its team, had been brought into the deal by Boston. So we were viewing Boston as the bidder, and we were viewing Abbott along with Bank of America and others as representatives, either as financing sources and/or as divestiture buyers.

Q. My question is really very simple. Was it your position that Abbott was entitled to due diligence merely because it was not solicited by Guidant? That is my question.

A. Well, you had a -- merely because they weren't solicited? I mean, there were other considerations that went into this. That wasn't -- you had to look at representative and whether you thought you fit comfortably in that whether or not we solicited them.

Q. So what's the answer to my question?

A. I don't think I'm saying exactly what you were saying. I'm not quite sure of the difference here, but --
Q. You're not suggesting that merely because Abbott was brought into this deal by Boston Scientific, by virtue of that alone, they were tied --
A. I don't think I'm suggesting that.
Q. Back to the paragraph that says, "Abbott is providing financing for Boston Scientific's proposal through the purchase of certain Guidant assets." That is, in fact, all that you knew at the time that you provided diligence to Abbott in December of 2005 with respect to Abbott's role in financing this transaction. Isn't that correct?
A. What was the first part? What was all that I knew, counselor?
Q. Isn't it a fact that the only thing that you knew in connection with Abbott's role as a "financing source" in December of 2005 when you determined to provide diligence to Abbott was that it was going to buy certain of the Guidant assets in connection with the divestiture, and Boston Scientific was going to use that to help pay for the transaction. Isn't that right?
A. I think that's correct. I don't think back when we made the decision, which was something like December 20, 21, I don't think I knew about the equity and debt. I think I knew about the purchase and I think it was for something like $4 billion.

Q. That would be true for any purchaser -- any purchaser of assets under that definition would be a financing source, wouldn't they?
A. Well, I guess you could say that or I think we ended up thinking that it was either a divestiture buyer in and of themselves were OK and whether you could always characterize them as a financing source, but there were two categories that had been discussed in connection with things like the Confi agreement where parties decided to clarify that as between them they thought representative included both financing sources, for example, Bank of America, or divestiture buyers. Maybe you could always argue that a divestiture buyer was included in the financing source, but since there were two different possibilities there, they decided to memorialize their understanding that both would qualify.
Q. Mr. Kury, the advice you say that Mr. Mulaney gave you in December was that Abbott was a representative because they were a financing source. Isn't that right?
A. I don't think I said that, did I? I think what he said to me back then was that it was permitted and that whether in effect they were a financing source or not or whether they were only, if you will, a divestiture buyer, that it was all right.
Q. Do you know Mr. Mulaney has testified that the advice he gave you in December of 2005 was that Abbott was a representative because it was a financing source. Do you know

that's what he testified to?
A. No, I do not.
Q. Now, in the definitive offer that was made by Boston Scientific, Abbott is not listed as a party for whom financing is required to complete the offer, are they?
A. I don't know that.
Q. Well, look at Kury Exhibit 38. You can look at page 1167. This is the merger agreement that was submitted along with the definitive -- this was a definitive offer, wasn't it?
A. This is from Boston. Is that correct? This is the Boston offer, yes. Yes, I see it.
Q. And at the top of that page under the heading "financing," the document says as follows: "Parent" -- Parent is Boston Scientific. Is that right?
A. Yes.
Q. And the company is Guidant, right?
A. Yes.
Q. "Parent has provided to the company a complete and accurate copy of the commitment letter (The Commitment Letter) a Merrill Lynch Cap Corporation, Merrill Lynch, Pierce, Fenner and Smith, Incorporated, Bank of America Securities LLC, and Bank of America NA, the lenders, addressed the parent and dated as of January 8, 2006."
I won't read the rest of that sentence but I will skip to next sentence. "The funds provided by the financing

together with parent's cash on hand as of the date hereof and as of the effective time are sufficient to fully fund the cash portion of the merger consideration." Do you see that, sir?
A. I do.
Q. Isn't it a fact that Skadden advised you that what Boston intended to use, the proceeds of the divestiture for was to refinance its acquisition debt, not to finance the acquisition?
A. Repeat that sentence, please?
Q. Let me show you Strain Exhibit 6.
THE COURT: Repeat the question. Let him answer.
Q. Isn't it a fact that Skadden advised you what Boston Scientific intended to use the proceeds of the divestiture for was to refinance its acquisition debt, not to finance the acquisition?
A. I don't remember that.
Q. All right. Would you look at Strain Exhibit 6.
A. I see it.
Q. We looked at this before. This is an email that Mr. Duwe sent to you attaching a memo that was written for you by Skadden entitled BSX Financing Commitment Letter. Is that right?
A. Yes.
Q. You see in the second paragraph of the memo the following statement is made: "The interim loan is intended to be drawn to the extent BSX does not complete an offering of debt

securities on or prior to the closing of the acquisition of Guidant. If the interim loan is drawn, it is intended to be refinanced with an offering of debt securities and/or the proceeds of asset sales after the closing." Is that right?
A. Yes.
Q. In any event, even if Abbott was a financing source or a lender, there is nothing in the merger -- in the definition of representatives in the merger agreement that includes lenders, is there?
A. There is -- repeat your question? There is nothing in which?
Q. In the merger agreement.
A. That allows.
Q. In the definition of representatives in the merger agreement that includes lenders?
A. Well, my understanding was that Skadden's view that it did include lenders.
Q. But there's nothing in the agreement which would point me to it. Tell me what it is you believe --
A. In the J&J agreement?
Q. In the J&J agreement, Exhibit 9. If you want, I'll show you where to look.
A. Aren't we talking about the concept of representative and I've testified that my advice from Skadden was that financing sources and divestiture buyers in their view were encompassed

and included in the concept of representative, and, therefore, to say Bank of America was not a divestiture buyer but was a financing source, they were a representative.
Q. There is nothing in the definition of representatives that talks about a third-party divestiture purchase, is there?
A. In the J&J agreement? No, there is nothing that specifically says that.
Q. Do you remember when we looked at the two additions to the Boston Scientific Guidant confidentiality agreement that Skadden proposed financing sources and that Shearman proposed the third-party divestiture candidates. Do you remember that?
A. I recall that, yes.
Q. Those were two different things, weren't they?
A. They can be.
Q. The parties who drafted that -- requested those additions didn't believe that financing sources included people who by virtue of purchasing assets made money available to the buyer?
A. I don't know that. I didn't think of it that way.
Q. That's why they felt both of were necessary to be added, wasn't it?
A. I don't know that.
Q. Please look now at Kury Exhibit 52. Could you confirm to me that Kury Exhibit 52 is a response that you got from Mr. Deyo on January 24 to your email of January 23 that we've looked at, and that was marked as Exhibit 51?

A. Yes, I see it.
Q. In this letter, Mr. Deyo is reiterating that he did indeed tell you during your January 9 telephone call that he saw no basis in the J&J Guidant agreement that provided confidential information to Abbott. Is that right?
A. That's correct.
Q. He also said that he asked you to provide an explanation. Is that right?
A. That's correct.
Q. And that he had not gotten a response. Is that right?
A. That's correct.
Q. Then he responded to the points that were made in your letter. Is that right?
A. That is correct.
Q. He said, "I do not see Abbott Laboratories as a joint with Boston Scientific but rather as a party agreeing to divestiture." Do you see that?
A. Yes.
Q. You agree with that, don't you?
A. I agree with that.
Q. Then he said, "Our agreement is clear. The agreement permits due diligence information to be provided only to the person making the takeover proposal and its representatives."
I'll stop there. You agree with that too, don't you?
A. I think so, but I was assuming that they were a

representative so I don't know --

Q. But you agree with the proposition --

A. I think so, counsel. I'm just not sure as a theoretical matter I might find something else.

THE COURT: Let him finish the question.

Q. You agree with the proposition that under the merger agreement, information was only entitled to be provided to the person making a takeover proposal and its representatives.

A. I think that's what the literal language would suggest.

Q. Are you saying that that's not what it means?

A. I was starting to say I'm not sure if I thought about it and was an academically inclined person I might think of another possibility, but I was certainly operating on the assumption that we wanted to fit into those categories.

Q. The statement you disagree with is that Abbott is neither. Is that right?

A. That's correct.

Q. He goes on to say that: "Abbott's provision of a subordinated loan to Boston Scientific does not change Abbott's position as a third-party divestiture recipient, nor does it change the context in which Abbott was provided information." Do you see that?

A. I do.

Q. Do you understand him to be saying the fact that Abbott later agreed to make a subordinated loan and purchase equity in

Boston Scientific, even if that was a permitted basis for due diligence under the merger agreement, not relevant to the basis on which you agree to provide them with diligence?
A. I guess that's what he is saying.
Q. And you agree with that too, don't you?
A. I think so.
Q. It also said, "If Guidant believed Abbott to be acting as a joint bidder, we assume that you would have informed Johnson & Johnson of Abbott's role prior to Boston Scientific's January 8 announcement pursuant to our agreement's requirement that you keep us fully informed as to the status and details of the takeover proposal." And you agree with that also, don't you?
A. I do.
Q. And you never responded to this letter, correct?
A. No. You have to understand where we were, counselor. This was the letter of the 23rd to which we responded was the night before the time expired in which Johnson & Johnson -- the letter of the 23rd came in at the end, close of business, the night before the time expired under which Johnson & Johnson could either raise its bid or have its merger agreement terminated for us to pay the breakup fee.
So to begin with, we viewed this letter on the 23rd as something that was a last-minute scare tactic; and while we wanted to respond to it, I'm not sure that we viewed it really as a legitimate breach letter saying that, OK, you are in

breach and we are considering suing you and things like that. And the deadline was running and so we sent them a response that evening. And the next morning we get something further disagreeing with us. But at that point we thought where we were, we had made our decision. There was no point in any further back and forth. Mr. Mulaney did not change his view on any of this. Whatever the back and forth was between us and Johnson & Johnson and Mr. Deyo's anguish or whatever he was, perplexed nature, did not change his confidence that we were correct. And I thought we were correct. I think I evidenced that by my email the night before when I said this is so lame. You may quarrel with our rationale, but I was clear at the time that we had the right to do this, and we weren't going to hold up the termination of the agreement by getting engaged in further dialogue

Q. My question was very simple. You didn't respond to this letter?

A. We did not respond to it. I'm explaining why.

Q. Now, notwithstanding that you can't remember the technical rationale that you claim justified providing Abbott with diligence, in your affidavit you now say that you understood that Guidant had the ability to do a passive market check in your affidavit paragraph 11?

A. Yes.

Q. You now say that you believe Guidant, therefore, had the

ability under Section 4.02 to investigate unsolicited offers including from bidders who required financing or divestitures and inform itself of those offers. Is that correct?
A. That's correct.
Q. You now say in paragraph 12 that you had no understanding and Skadden never suggested to you that this process limited Guidant's ability to investigate all types of unsolicited competing proposals, including proposals from bidders who might require significant financing or who might require divestiture partners for antitrust reasons. That's paragraph 12?
A. That's correct.
Q. From that, you conclude "The term representative has to be interpreted to include more categories. Had anyone suggested to me that it might not, I would have been concerned that Guidant would be significantly impeded from reasonably investigating whatever unsolicited proposals it was likely to receive." That is in paragraph 18 B. Is that correct?
A. That's correct.
Q. Those things don't follow at all from each other, do they?
A. There was a sneeze there. Would you repeat?
Q. Those things don't follow each other at all, do they?
A. I'm not sure what you're saying.
Q. The issue in this case is not from whom you could consider offers, but to whom you could provide information once a qualified offer was made. Isn't that right?

A. Yes, but in considering what a qualified offer is, we wanted to be able to consider, and we thought we could consider, a bid that we received from someone who was going to need, for example, financing or was going to need a divestiture buyer.
Q. No one was suggesting you couldn't consider such offers, were they?
A. Well, my understanding was that if you took the position that, for example, we could not provide information to, say, Bank of America, we would not be able to -- there wouldn't be much of a point having a bid from Boston because they couldn't make one we could carry out if we could not provide the information to their banker.
Q. You're aware Boston's tentative proposal said that there were no conditions to the financing commitments, weren't you?
A. I don't remember that.
Q. Should we look at it?
A. We can look at it. I'm not saying you're wrong. I just don't remember that right now as I'm sitting here.
Q. In fact, Mr. Kury, as we previously discussed, with full knowledge of what Section 4.02 provided and the lack of restrictions on what type of offer could be considered, Skadden was advising you in December not to provide due diligence to these third parties until there was a definitive agreement. Isn't that correct?

A. That was Neal Stoll from an antitrust point of view.
Q. He didn't think that hindered Guidant's ability to consider other offers, did he?
A. I don't know what he thought about that.
Q. And at one point you agreed, didn't you?
A. Until I had information from the corporate side and ultimately from the antitrust side that he wasn't firm on that position, that we could go ahead sooner than he initially suggested.
Q. What really happened, Mr. Kury, was that Guidant was put under tremendous pressure by Boston Scientific. That's why you changed your view, isn't it?
A. No.
Q. You didn't want to lose Boston Scientific because now you saw a bidding war in the offing, didn't you?
A. I didn't want to lose Boston Scientific, but, on the other hand, I didn't want to violate my agreement with Johnson & Johnson, so I was looking to Guidant -- to Guidant -- I was looking to Skadden to steer me through this, and they said we could do this.
Q. This notion that because you were allowed to consider offers with divestitures or the offers of financing would mean that in every transaction where there was divestiture or financing regardless of what the merger agreement says, you could just give due diligence to those people, right?

A. Well, the question is what does a merger agreement mean. I was being advised by preeminent counsel that the word representative or the word representative properly included these kind of people.
Q. I'm not asking you about that. I'm asking you now about the statements in your affidavit that because Guidant was permitted to make a passive market check, you have to interpret these provisions to allow that due diligence. That's what I'm asking you about. That's not the advice you received from Mr. -- that's not the advice you claim you received from Mr. Mulaney in December of 2005, is it?
A. I'm not sure what the discrepancy is, counselor.
Q. You knew when the first J&J merger agreement was being negotiated, that a divestiture might be required, didn't you?
A. It would have been likely or at least a substantial possibility of that, yes.
Q. In fact, J&J had to agree to make certain divestitures if the FTC required it, didn't it?
A. Yes.
Q. It took antitrust risk in doing that, didn't it?
A. Yes.
Q. Because if the FTC required it to make the divestitures and they already agreed with you that they would, they have to do it no matter what. Isn't that right?
A. That's correct.

Q. If Guidant and its attorneys thought it was important for third-party divestiture candidates to get due diligence, they could have negotiated to put that in the agreement, couldn't they?
A. They could have.
Q. Just like Boston Scientific did when it got you to agree to allow such disclosure in the Guidant confidentiality agreement that they thought was necessary, right?
A. Certainly we could have negotiated if they had thought that it was necessary, but so far as they didn't or why they didn't at the time, I don't know why, but that doesn't change what Mr. Mulaney already told me that whether or not it was in there, he thought it was in there.
Q. You could have done the same thing when you negotiated the amended merger agreement, right?
A. Again, you're right, but I don't know what -- I cannot speak to why they did not on their own seek to negotiate a change in that.
Q. In fact, when you negotiated the amended merger agreement, you knew that Boston Scientific might be interested in acquiring Guidant, didn't you?
A. Only in the sense that there was that overture from Mr. Nicholas to have a meeting.
Q. And you knew perfectly well that if Boston Scientific made a bid, divestitures would be an issue, didn't you?

A. Well, yes, I think so.
Q. Because Boston Scientific was in the DES business, right?
A. If we thought that they were going to make a bid, yes, I guess it would have been -- we would have put something in there, yes.
Q. Two parties, two parties in the entire United States of America who you knew would have to make a divestiture were Johnson & Johnson and Boston Scientific because they were the only two companies in the United States that were in the drug-eluting stent business at that time. Isn't that right?
A. I don't know that.
Q. And Guidant was developing a drug-eluting stent?
A. Well, that's true.
Q. The fact is that notwithstanding your statement about Guidant being able to consider offers that would require a divestiture and financing, there were plenty of ways that Boston Scientific could have made an offer without a definitive deal without it or without Guidant providing diligence to Abbott, weren't there?
A. I haven't thought that through.
Q. You read Guidant's expert report in this case?
A. Repeat your statement.
Q. Have you read Guidant's expert report?
A. No.
Q. Eric Brown. He gave us three different ways.

A. Well, that's fine. I haven't seen it.
Q. One way Boston Scientific could have done the same thing J&J did, couldn't it? It could have taken an antitrust risk, right?
A. They could have.
Q. They could have said, you know what? We said in our tentative proposal that we would divest. Here is our definitive offer. We will divest. We'll go to the FTC. If the FTC requires us to divest, we will divest. It could have done that right?
A. I suppose so, I mean you're asking me things I hadn't thought through at the time.
Q. Mr. Kury, that's done all the time, isn't it?
A. I don't know that.
Q. J&J did it, didn't they?
A. J&J is J&J. It's different.
Q. And they could have gotten somebody to agree; maybe not Abbott, but somebody else to agree to purchase the divested business subject to due diligence that they would get after the J&J Guidant agreement was terminated, couldn't they?
A. They could have, yes.
Q. That's done all the time too, isn't it?
A. I don't know that.
Q. Boston Scientific just wasn't willing to do that, right?
A. I don't know that.

Q. Well, before I get to that, they also could have made a joint bid with Abbott, couldn't they?
A. I guess they could do that, yes.
Q. If they did that, they would have to tell J&J that Abbott was a maker of the takeover proposal, wouldn't they?
A. Yes.
Q. That didn't happen because they wouldn't do that, right?
A. I don't know why that wasn't done that way.
Q. The reason those other things didn't happen is because Boston Scientific just wasn't willing to take the risk that FTC would say divest the VI and ES businesses, but Boston Scientific wouldn't get the amount of money that it felt it wanted for those businesses once the whole world knew they had to divest it. Isn't that right?
A. I don't know that, but that is not an unreasonable conjecture. I guess once the world knows that you must divest, and divest within a relatively short period of time, I think there would be tendency to have hard bargaining for the price of those assets.
Q. Are you telling us that the Guidant board could not determine whether the Boston Scientific offer was superior without given diligence to Abbott, assuming Boston Scientific would have been prepared to make that offer without having Abbott on the dotted line?
A. Whether the board -- the board did not -- we did not go to

the board about providing diligence to Abbott.
Q. That is not my question.
A. What is your question?
Q. My question is: If Boston Scientific had been willing to take the antitrust risk and make an offer that says we will divest, hell or high water, we will divest, are you telling me the Guidant board could not determine in those circumstances whether the Boston offer was superior?
A. They could have determined that. I just don't remember thinking about it that way.
Q. In fact, what the Guidant board is supposed to do in that circumstance is determine whether the proposal is superior. Isn't that right?
A. That's what they're supposed to determine, yes.
Q. Not that it is superior. Isn't that right? They have to decide whether the offer that is put on the table, with whatever terms and conditions it's put on the table with, is or is not a superior proposal. Isn't that right?
A. Yes.
Q. It's not the job of Guidant to facilitate an offer to make it as good as possible, is it?
A. It's not their job, no.
Q. In fact, Skadden told you that after receiving the tentative offer from Boston, that Guidant was not permitted to facilitate Boston Scientific's proposal, did they?

A. I think that's right.
Q. Let's look at Kury Exhibit 65. I would like you to confirm for me that this Exhibit is a presentation that was used for the Guidant board of directors meeting on December 6 to consider the Boston Scientific offer of -- December 7, I'm sorry, to consider the Boston Scientific tentative proposal of December 5.
A. I have no reason to doubt the authenticity of these documents.
Q. If you look at the page -- you were at that board meeting?
A. I certainly was.
Q. If you look at the page Bates numbered 102860, is that a memorandum of that reflects advice or answers to certain questions that were provided by Skadden for the board meeting on December 7, 2005?
A. Yes.
Q. The question that was being answered, the first question is, may Guidant negotiated with Boston Scientific. Is that correct?
A. Yes.
Q. And Skadden said, "Guidant is generally prohibited from soliciting, encouraging or facilitating a third-party takeover proposal or entering into any discussions or providing information regarding a takeover proposal."
Do you see this?

A. Yes.
Q. Then it said, "However, if the board takes certain actions" I'm not going to quote them, "Guidant may furnish information to Boston Scientific pursuant to a confidentiality agreement not less restrictive to Boston Scientific than the confidentiality provisions of the confidentiality agreement with Johnson & Johnson, so long as the information has previously been provided to Johnson & Johnson or is provided to Johnson & Johnson prior to or substantially concurrent with the time it has provided to Boston Scientific with the addition of furnish information to Boston Scientific and its representatives." Would you agree this is one thing that Skadden advised the board Guidant could do?
A. Yes.
Q. And the other thing was participate in discussions or negotiations with Boston Scientific and its representatives. Is that right?
A. Yes.
Q. And that's it, right?
A. Yes.
Q. So even if Guidant's motivation was to provide due diligence to Abbott to maximize shareholder value, it couldn't do it unless it was permitted by the agreement. Isn't that right?
A. Sure.

Q. I'm sorry?
A. Yes.
Q. You're not suggesting that Guidant could breach the agreement as long as the effect of the breach is to receive a higher offer?
A. Absolutely not.
Q. So the mere fact that giving Abbott due diligence led Boston Scientific to make an offer or a better offer doesn't justify breach of contract, does it?
A. No.
Q. In fact, Mr. Mulaney advised the board that maximizing shareholder value -- he advised the board in connection with the first J&J proposal that advising -- I'm sorry -- that maximizing shareholder value need not be the controlling factor when Guidant received the initial takeover proposal from Johnson & Johnson. Isn't that right?
A. That's correct.
Q. And you understood that that was the standard that applied when the board was considering Boston's proposal?
A. That is correct.
Q. Guidant was sued by its shareholders when it agreed to the amended merger agreement with Johnson & Johnson, wasn't it?
A. Yes.
Q. The shareholders argued that Section 4.02 shouldn't be enforced. Isn't that right?

A. I don't think they were focusing on any technical aspect. They just wanted to make sure they got the best price they could.
Q. The shareholders argued that the no-solicitation clause of Guidant and J&J merger agreement was an unreasonable lockup or restriction on the ability of Guidant to accept future or other offers?
A. You said they alleged that? I didn't have -- I had very little participation in that lawsuit. It was -- I hired another law firm, not Skadden, as I recall, to defend that, and we went forward. I don't have any recollection of what their specific allegations were.
Q. Is it your recollection that it was Skadden or Wilson Sonsini?
A. I think it was Wilson Sonsini.
Q. Could you look at Skadden 75? It's a big transcript. It was a transcript sent to you by Boris Feldman. It was transcript of preliminary injunction hearing. You see that?
A. Yes.
Q. Would you agree with me that arguments Guidant made in connection with the shareholders' attempt to enjoin the $63 J&J/Guidant merger agreement are in this transcript?
A. I haven't read this in, whatever it is, eight years, but so, do you want me to read it now?
Q. No.

Do you recall -- you can look at 5633, page 5633 -- that a no-shop provision ensures that a bidder must make a written proposal, and then the board has to declare it potentially superior to get the process going?

A. All right.

Q. On the next page, Guidant argued that the no-shop provision in the agreement did not prevent Guidant from getting an offer from Boston Scientific.

A. Where are you reading now, sir?

Q. It's on the next page.

A. Which part, sir?

(Continued on next page)

Q. It's actually not on that page. But I'll just ask you whether you recall that the argument that Guidant made was that, in fact, the no-shop provision did not prevent Guidant from getting an offer from or a proposal from Boston Scientific on December 5th?
A. Is that controversial? I mean, we did get an offer on December 5th, and we did consider it.
Q. And are you aware that in defendant Guidant's agreement to the no-shop provision, Mr. Feldman said to the Court, perhaps to some people contracts aren't contracts but to the Guidant board, a contract is a contract?
A. That is what he said. I just read that, yes.
Q. And the contract says you can't provide due diligence to Abbott, and the fact that without that, Boston Scientific would not have made a higher offer doesn't justify a breach, does it?
A. I think I've said consistently that whatever we did was not done on the basis that we would violate the agreement in order to get a higher price.
MR. WEINBERGER: Your Honor, I still have some 30 minutes, 45 minutes to go.
THE COURT: All right. Well, let's break for the evening. And, Mr. Boies, do you have any sense as to how long you'll be?
MR. BOIES: Based on so far, your Honor, I would say an hour, an hour and 15 minutes.

THE COURT: Okay. All right. So assuming then a few questions from me, perhaps and a few questions of recross and redirect or re-redirect, I guess, we'll probably wrap up with Mr. Kury by noon, I think. Do you think that's fair?

MR. WEINBERGER: Yes.

THE COURT: So then we're going to go to Mr. Stoll, is that the plan?

MR. WILSON: Mr. John, your Honor.

THE COURT: Mr. John, I'm sorry.

MR. WILSON: Ian John.

THE COURT: Right. And then we're going to play some deposition testimony at some point?

MR. OHLEMEYER: We have another live witness tomorrow, Professor Cornell.

THE COURT: Right.

MR. OHLEMEYER: He's coming from some distance; so it seems to me it would make sense to deal with the live witnesses and then decide whether it even makes sense to play.

THE COURT: I understand. Okay. So how long do you think Mr. John is going to be?

MR. WEINBERGER: I think the cross is likely to take a couple of hours; so it might be a little ambitious to think that all three of these people are going to be done tomorrow.

THE COURT: All right. Well --

MR. WEINBERGER: I'd like, actually, for them to let us know what order. If Cornell is coming from a distance and they want to put him on first, that's fine. We'd just like to know that.

MR. OHLEMEYER: We have to talk about it. I don't know that he's got an issue.

MR. WEINBERGER: Just let us know.

MR. BOIES: We'll consult as soon as we go back, and let you know.

THE COURT: All right. So unless otherwise notified, then after Mr. Kury, it's going to be Mr. John, then Mr. Cornell, and then deposition testimony, if needed.

MR. WEINBERGER: Yes. It's not long, but we do think it's important to see.

THE COURT: All right. But I can watch that at home with popcorn, right? It's not going to change, depending on who's watching it with me. Okay.

MR. WEINBERGER: Your Honor, would you just instruct Mr. Kury not to discuss his testimony?

THE COURT: I think you probably understand this, Mr. Kury, but you're on cross-examination; so don't discuss the substance of your testimony with anyone. You can talk logistics, but don't discuss the substance of your testimony. Okay?

THE WITNESS: Yes.

THE COURT: So we'll see you at 9:30, a little bit before. You can leave everything here.

THE WITNESS: Okay. You'll give me some more water.

THE COURT: I'll give you more water and ice.

(Witness temporarily excused)

THE COURT: Anything else before we break for the day? No?

MR. WEINBERGER: No, your Honor.

MR. BOIES: No.

THE COURT: All right. I'll see you tomorrow. Thank you.

(Adjourned to December 17, 2014, at 9:30 a.m.)

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